

A Search for Clarity and Consistency in Judicial Process: the Maryland Court of Appeals Decides Whether to Change Common-law Rules

C. Christopher Brown

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Article

A SEARCH FOR CLARITY AND CONSISTENCY IN JUDICIAL PROCESS: THE MARYLAND COURT OF APPEALS DECIDES WHETHER TO CHANGE COMMON-LAW RULES

C. CHRISTOPHER BROWN*

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* Associate Professor of Law, University of Maryland School of Law; Partner, Brown, Goldstein & Levy; B.A., Swathmore College; M.A., University of Delaware; J.D., Georgetown University Law Center.

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INTRODUCTION

Anyone first learning of the legal issues presented in *State v. Sowell*¹ prior to the issuance of the Maryland Court of Appeals' opinion would anticipate having no difficulty in predicting its outcome. At issue was the continued viability of the ancient common-law rule that treated more harshly those present at the scene of a crime (the principals) than those who masterminded it, but were not present (the accessories).² In *Sowell*, the State asked the Court of Appeals to disregard this distinction and uphold the defendant's conviction regardless of his location at the time of the crime.³ After all, the lead strategist of a criminal scheme is at least as much to blame as his agents who carried it out.⁴

In its opinion, the Court of Appeals acknowledged that Maryland may be the last state in the Union to retain this counterintuitive preference.⁵ It added that the rule is a "most undesirable hypertechnicality" that "not infrequently operates to thwart justice and reduce judicial efficiency."⁶ It further recognized that while the rule may have been reasonable in fourteenth and fifteenth century English

1. 353 Md. 713, 728 A.2d 712 (1999).

2. *Id.* at 717-18, 728 A.2d at 714-15.

3. *Id.* at 717, 728 A.2d at 714.

4. *Id.* at 719-20, 728 A.2d at 715-16 (citing *State v. Williamson*, 282 Md. 100, 112-14, 382 A.2d 588, 594-95 (1978) (Levine, J., concurring)).

5. *Id.* at 721-22, 728 A.2d at 716-17.

6. *Id.* at 720, 728 A.2d at 716 (quoting *Williamson*, 282 Md. at 113, 382 A.2d at 595) (Levine, J., concurring)); see generally John H. Tate, Jr., Comment, *Distinctions Between Accessory Before the Fact and Principal*, 19 WASH. & LEE L. REV. 96 (1962) (urging removal of outdated distinctions between principals and accessories before the fact).

common-law courts, it has now outlived its purpose.⁷ Indeed, it noted, today we blame the accessory before the fact more than the principal.⁸ Furthermore, on four separate occasions over the past twenty years, the court had abrogated some applications of the common-law rule.⁹ Despite this thorough trashing of the outmoded doctrine, the court refused to abolish it.¹⁰ Noting that state legislatures had generally been the vehicles of this change in the rest of the country, and inferring a reluctance to depart from the General Assembly's inaction on the subject, the court refused to render the doctrine's death knell.¹¹ Due to the gravity of transforming a common-law doctrine, it decided to leave the task to the state legislature.¹² Thus, the "undesirable hypertechnicality" lived on until it was abrogated by the General Assembly in its 2000 session.¹³

Sowell invites a host of questions regarding the proper role of a state's highest appellate court in using its power to revamp outmoded common law. If deference to the legislature was the proper outcome on the extreme facts of *Sowell*, when would judicial intervention ever be proper? In light of the fact that the judiciary once created the common-law rule in question, should not there be occasions when, using the phrasing of Judge Irma Raker's concurring opinion, the "Court should clean up its own cobwebs and abolish" an outmoded rule?¹⁴

This Article first attempts in Parts I and II to learn the circumstances under which the Court of Appeals will choose to re-evaluate a rule on its own and when it will choose a passive approach and defer this decision to the legislature. Are there certain circumstances under which the court will opt for one direction more often than the other? Do the merits of the requested change affect the court's process deci-

7. *Sowell*, 353 Md. at 719-20, 728 A.2d at 715-16 (citing *Williamson*, 282 Md. at 113, 382 A.2d at 595 (Levine, J., concurring)).

8. *Id.* at 720, 728 A.2d at 716 (citing *Williamson*, 282 Md. at 114, 382 A.2d at 595) (Levine, J., concurring)).

9. *Id.* at 722-23, 728 A.2d at 717; see also *State v. Hawkins*, 326 Md. 270, 294, 604 A.2d 489, 501 (1992) (abolishing the common-law limitation that an accessory after the fact may not be a principal in either degree); *Jones v. State*, 302 Md. 153, 159-61, 486 A.2d 184, 188-89 (1985) (holding that an accessory before the fact may be convicted of a greater crime than the principal); *Lewis v. State*, 285 Md. 705, 715-16, 404 A.2d 1073, 1079 (1979) (abrogating the common-law requirement that a principal be sentenced before an accessory can be tried); *State v. Ward*, 284 Md. 189, 200, 396 A.2d 1041, 1048 (1978) (stating that there may be an accessory before the fact for murder in the second degree).

10. *Sowell*, 353 Md. at 726, 728 A.2d at 719.

11. *Id.*

12. *Id.*

13. 2000 Md. Laws 339 (codified at MD. CODE ANN., CRIM. PRO. § 4-204 (Supp. 2002)).

14. *Sowell*, 353 Md. at 741, 728 A.2d at 726 (Raker, J., concurring).

sion? What signals coming from the legislature does the court deem significant? In general, what is the court's *stare decisis* of when to act on its own to change *stare decisis*?

The second aspect of this Article, Part III, is evaluative. Should the court possess a set of rules defining when to effect change unilaterally and when to defer? If so, what should they be? How should the court measure its capacity as a decision maker with that of the legislature? When has the legislature signaled an intent to preempt an area and preclude further judicial development?

* * *

The thirty-three cases studied for this analysis, mostly rendered by the Court of Appeals over the last five decades, each encountered a request to alter significantly the existing rules of the common law. They are listed in Appendix A. To borrow from the Supreme Court's definition in a similar context, these cases considered imposing a new legal principle, "either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."¹⁵ The thirty-three cases generally sought to establish the existence of a new cause of action or defense, or to eliminate or add an element to a common-law civil claim or crime. They, therefore, raised fundamental issues about the common law, not just its minor interpretations.

Not included in this study are cases raising issues as to other forms of judicial activism, such as ruling legislative or executive acts unconstitutional or interpreting those acts in an aggressive manner arguably hostile to the other branches of government.¹⁶ Also ex-

15. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (citations omitted).

16. Such a clash purportedly occurred after the issuance of three 1999 Court of Appeals opinions brought on the 2000 legislative session's backlash. In that session, the General Assembly voted to overturn the court's decision in *United Cable Television of Baltimore Ltd. Partnership v. Burch*, 354 Md. 658, 732 A.2d 887 (1999), which held a \$5 per month late fee charged by a cable provider to be invalid as a penalty. 2000 Md. Laws 59 (codified at MD. CODE ANN., COM. LAW II § 14-1315 (Supp. 2002)). House Bill 1434 was introduced to overturn *Riemer v. Columbia Medical Plan, Inc.*, 358 Md. 222, 747 A.2d 677 (2000), which had ruled that an HMO's policy of seeking subrogation from its members whenever they recover from a third party in a tort action violated the Maryland HMO Act. H.B. 1434, 2000 Leg., 414th Sess. (2000) (unfavorable vote by committee). Finally, Senate Bill 904 was introduced to remove the court's power to constitutionally interpret the single-subject rule. S.B. 904, 2000 Leg., 414th Sess. (Md. 2000) (no action taken). See generally Thomas W. Waldron, *Assembly Fights Md.'s Top Court*, BALT. SUN, Mar. 26, 2000, at 1B (reporting on the tensions between the Court of Appeals and the General Assembly).

cluded as redundant are those cases in which repetitive requests to alter the same common-law rule were unsuccessful over the years.¹⁷

Because tort law has deep roots in the common law and helps define the fundamental relationships between persons in our society, it is no surprise that almost three-fifths of the thirty-three selected cases involved tort issues. Torts is perhaps the one area of the common law that has least succumbed to legislative or judicial code-making.¹⁸ Statutes, however, have supplanted most other common-law fields.¹⁹ Nine of the remaining cases concerned common-law criminal issues; the other five posed property-law, conflicts-of-law and evidence issues.²⁰ The cases span half a century, from the 1951 recognition of a child's right to sue for prenatal injuries²¹ to the court's 1999 refusal to act in *Sowell*.²²

Effecting change surely comes with difficulty to most decision makers. To a seasoned lawyer now sitting as an appellate judge the status quo is usually familiar, understood and therefore, a comfortable preference. Altering a situation requires an abnormal expenditure of energy. One must muster the conviction to be rid of the old and then create its better replacement. Also it often involves an adventure into the unknown, a risk taking that might end badly. Furthermore, requests to change the common law often produce acrimony. Someone is asserting that present conditions so differ from the past that an old,

17. See, e.g., *Sherman v. Suburban Trust Co.*, 282 Md. 238, 246-48, 384 A.2d 76, 81-82 (1978) (stating that Maryland retains a common-law tort duty owed to a trespasser despite modern trends to alter it); see also *Williams v. State*, 292 Md. 201, 438 A.2d 1301 (1981) (upholding the common-law right of defendant to be present during conversations between judge and prospective jurors); *Porter v. State*, 289 Md. 349, 424 A.2d 371 (1981) (same); *Bunch v. State*, 281 Md. 680, 381 A.2d 1142 (1978) (same).

18. See generally Robert L. Rabin, *Federalism and the Tort System*, 50 *RUTGERS L. REV.* 1, 2 (1997) (examining the proper role of federal and state government in determining tort law). This is not to say that modern tort law has been without nonjudicial influence:

To suggest that there has been no executive or legislative participation in the shaping of modern tort law is both a distortion and a disservice to those interested in understanding the crisis in torts. Any personal injury attorney who eschews statute books in favor of exclusive reliance on case reporters will quickly find himself the defendant in a malpractice action

Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 *Nw. U. L. REV.* 1026, 1034 (1989) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)).

19. See Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 *WIS. L. REV.* 1119, 1123-24 (discussing the codification of American common law in the past seventy-five years and the implications on judicial discretion).

20. See *infra* notes 236-253.

21. *Damasiewicz v. Gorsuch*, 197 Md. 417, 440-41, 79 A.2d 550, 560-61 (1951).

22. 353 Md. 713, 726, 728 A.2d 712, 719 (1999).

trusted rule must be discarded. This naturally causes, in part, generational friction. This case study examines one appellate court's struggle to deal with requests for such change.

I. BASES ON WHICH THE COURT HAS HISTORICALLY CHOSEN TO DEFER

Basic state constitutional provisions define the respective powers of the Court of Appeals and the General Assembly. Article 5 of the Maryland Declaration of Rights provides in pertinent part:

That the Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on [July 4, 1776]; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.²³

The Court of Appeals, which finds its grant of power in Article IV, section 1, of the Maryland Constitution,²⁴ long ago articulated its role in refining this inherited common law. In the oft-cited words of Chief Judge Chase in the 1821 case of *State v. Buchanan*:²⁵ "Whether particular parts of the common law are applicable to our local circumstances and situation, and our general code of laws and jurisprudence, is a question that comes within the province of the courts of justice, and is to be decided by them."²⁶ This power includes the ability to determine "what part of that common law is consistent with the spirit of Maryland's Constitution and her political institutions."²⁷ Thus, in the court's words, "[b]ecause of the inherent dynamism of the common

23. MD. DECL. OF RTS. art. 5.

24. That section of the Maryland Constitution states:

The Judicial power of this State is vested in a Court of Appeals, such intermediate courts of appeal as the General Assembly may create by law, Circuit Courts, Orphans' Courts, and a District Court. These Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing from it.

MD. CONST. art. IV, § 1.

25. 5 H. & J. 317 (Md. 1821).

26. *Id.* at 365-66. Among those citing the *Buchanan* opinion for this purpose are *Ireland v. State*, 310 Md. 328, 331, 529 A.2d 365, 366 (1987); *Moxley v. Acker*, 294 Md. 47, 52, 447 A.2d 857, 859 (1982); *Pope v. State*, 284 Md. 309, 341-42, 396 A.2d 1054, 1073 (1979); *Ass'n of Indep. Taxi Operators v. Yellow Cab Co.*, 198 Md. 181, 204, 82 A.2d 106, 117 (1951).

27. *Ireland*, 310 Md. at 331, 529 A.2d at 366.

law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge.”²⁸

The legislature, however, holds the ultimate trump card. Being the branch of government closest to the Constitution’s “source of power”—the citizens²⁹—it is the highest branch of government.³⁰ As Chief Judge Chase stated in *Buchanan*, “The common law, like our acts of assembly, are subject to the control and modification of the legislature, and may be abrogated or changed as the general assembly may think most conducive to the general welfare”³¹ Within constitutional confines, the Court of Appeals may, by acting independently or by overruling prior decisions, change the common law to the form it wishes.³²

Consequently, there is little room for debate as to the relative authorities of the Court of Appeals, on the one hand, and the General Assembly and the Governor’s signature, on the other. The court can declare that the common law, and its pronouncement will have full force and effect until the legislature alters it. At issue, here, is how the court should decide when it should choose to exercise its undisputed power.

A. *Determining Whether the Legislature Is Better Suited to Decide*

Assuming the legislature has not preempted judicial action, it then must be asked when the court should exercise its discretionary Article 5 power to change the common law. One can summon many reasons why a legislative body could be deemed the more superior decision maker than a court. It may be in certain situations that the legislature’s deliberate process is more capable of reaching a sound result. In some respects, judicial inquiry is more limited than the legislative process. Some might see the array of judicial remedies to be more limited than legislative options. Furthermore, some might feel that deference to an elected branch of government is preferred. This section will consider the Court of Appeals’ approach over the past fifty

28. *Id.*, 529 A.2d at 366 (citing *Harris v. State*, 306 Md. 344, 357, 509 A.2d 120, 125 (1986) and *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 140, 497 A.2d 1143, 1150-51 (1985)); see also *Am. Trucking Ass’n v. Goldstein*, 312 Md. 583, 592 n.7, 541 A.2d 955, 960 n.7 (1988) (stating that the court may change the common law under Article 5 of the Maryland Declaration of Rights).

29. Maryland’s Constitution is based on the idea that government’s power derives from the people. *Whittington v. Polk*, 1 H. & J. 236, 242 (Md. 1802).

30. *Crane v. Meginnis*, 1 G. & J. 463, 472 (Md. 1829).

31. *Buchanan*, 5 H. & J. at 366.

32. *Ireland*, 310 Md. at 331, 529 A.2d at 366; see also *Pope v. State*, 284 Md. 309, 352, 396 A.2d 1054, 1078 (1979).

years toward the issue of which branch is the preferred decision maker.

1. *Conclusory Reasons for Judicial Deference.*—The Court of Appeals has often declined the opportunity to affect change in the common law without giving any explanation for why it deferred to the legislature.³³ By failing to explain the bases for its actions, the public is left in the dark as to what is motivating the court. This failure to explain could also mask illogical lines of thinking that are not publicly reviewable.

Equally unenlightening are those frequent occasions when the court resorts to two rather vague, unexplicated phrases. On some occasions it has suggested that because it promotes “consistency and stability,” legislative change is preferable to that effected by the judiciary. At other times the court has described a request for change as involving a decision of “public policy,” which, it then at times concludes, normally should only be resolved by the legislature. Upon inspection, neither of these grounds provides a very firm foundation for the avoidance of judicial decision making.

a. *The Promotion of “Consistency and Stability.”*—A 1979 challenge to the continued viability of the rule of qualified municipal immunity has produced one of the most extreme judicial statements in support of deference to the legislature.³⁴ In *Austin v. Mayor of Baltimore*,³⁵ the Court of Appeals justified its refusal to part with its desire to have consistent stable laws upon which citizens can rely to guide their actions.³⁶ Quoting the reasoning of an 1897 decision, the *Austin* majority opinion explained:

It is often difficult to resist the influence which a palpable hardship is calculated to exert; but . . . a rigid adherence to fundamental principles at all times and a stern insensibility to the results which an unvarying enforcement of those prin-

33. See, e.g., *Hensel v. Beckward*, 273 Md. 426, 432, 330 A.2d 196, 200 (1974) (deferring abrogation of the “boulevard rule” to the legislature). There may be times when the court’s conclusory deference to the legislature is simply due to having quite frequently rebuffed requests for change on the same issue. See, e.g., *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 195, 428 A.2d 459, 465 (1981) (repeating the court’s rejection of the attractive nuisance doctrine).

34. Under judge-made law, local governments are immune from tort actions arising out of “governmental,” but not “proprietary” acts. See *Katz v. Washington Suburban Sanitary Comm’n*, 284 Md. 503, 508 n.3, 397 A.2d 1027, 1030 n.3 (1979) (distinguishing total immunity from tort liability from limited immunity from tort liability).

35. 286 Md. 51, 405 A.2d 255 (1979).

36. *Id.* at 57, 405 A.2d at 258.

ciples may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured.³⁷

The *Austin* majority opinion did, indeed, insulate itself from the hardship posed by the facts. One has to read the dissent to learn that the suit concerned a five-year-old child who drowned due to the admitted negligence of employees of the City of Baltimore.³⁸

Austin further drew support from this older opinion when it declared that it is "for the Legislature by appropriate enactments and not for the Courts by metaphysical refinements to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles."³⁹ Although three judges in *Austin* refused to adopt such an extreme, unbending adherence to stare decisis,⁴⁰ many other Court of Appeals opinions have reiterated these principles.⁴¹

The underpinning for all of this, however, is that only legislative change is best suited to produce "certainty and stability." But an announcement of a rule change by the judiciary would seem to be as clear and intelligible as one by the legislature. Statutes can be just as ambiguous as judicial opinions. The legislature can be just as fickle as the judiciary in equivocating regarding a new rule change. Furthermore, if the law is to change, some instability will occur regardless of which body declares it. In the words of the President of the Supreme

37. *Id.* (quoting *DeMuth v. Old Town Bank*, 85 Md. 315, 320, 37 A. 266, 266 (1897)).

38. *Id.* at 78, 405 A.2d at 269 (Cole, J., dissenting).

39. *Austin*, 286 Md. at 57, 405 A.2d at 258 (quoting *DeMuth*, 85 Md. at 320, 37 A. at 266). Judge Orth, writing for the court, voiced his down-to-earth respect for tradition by refusing to join "in the crusade against sovereign immunity and to join the ranks of those courts already marching under the pennons of the law professors." *Id.* at 56, 405 A.2d at 257 (quoting *Robinson v. Bd. of County Comm'rs*, 262 Md. 342, 345, 278 A.2d 71, 73 (1971) (footnotes omitted)). Instead, he stuck with a doctrine "rooted in the ancient common law" and "firmly embedded in the law of Maryland." *Id.* at 53, 405 A.2d at 256 (quoting *Katz*, 284 Md. at 507, 397 A.2d at 1030).

40. Judge Eldridge asserted his view that the common law is not so static. *Austin*, 286 Md. at 68-69, 405 A.2d at 264 (Eldridge, J., concurring in part, dissenting in part). He, indeed, would have voted to modify the immunity rule had it not been for the unique legislative history that existed regarding the shaping of its scope. *Id.* Judges Smith and Cole also dissented. *Austin*, 286 Md. at 78, 405 A.2d at 269 (Cole, J., dissenting).

41. See, e.g., *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 459, 456 A.2d 894, 902 (1983) (citing *DeMuth*, 85 Md. at 320, 37 A. at 266) (emphasizing the need for rigid adherence to stare decisis). The certainty-stability language has been repeated as recently as 1998, *State v. Wiegmann*, 350 Md. 585, 604, 714 A.2d 841, 850 (1998), and has formed the basis of dissent, *Boblitz v. Boblitz*, 296 Md. 242, 284, 462 A.2d 506, 525 (1983) (Couch, J., dissenting) (citing *Harrison*, 295 Md. at 458-60, 456 A.2d at 902-03).

Court of Israel, “[s]tability without change is degeneration.”⁴² As is developed more fully below,⁴³ if either body chooses not to affect those who have relied upon the rule in the past, it may limit its change to prospective effect only.

b. The Generalized “Public Policy” Approach to Deference.—On other occasions, the Court of Appeals has concluded that the legislature is the preferable decision maker without discussing the attributes that account for this preference. Thus, a frequent approach has been to declare summarily that the rule at issue concerns “public policy,” and therefore, is best left to the legislature. The underlying assumption of these cases—that only the legislature should resolve issues of “public policy”—has never been fully explained.

The 1957 case of *Cole v. State*⁴⁴ is one such example. Cole, who had been sentenced to death, sought to convince the court to move away from the nineteenth century common-law *M’Naghten*⁴⁵ rule, which focused upon the defendant’s capacity to distinguish between right and wrong.⁴⁶ Instead, he argued, the court should follow the lead of the District of Columbia Circuit in *Durham v. United States*,⁴⁷ and further require prosecutorial proof that the defendant’s unlawful act was not the “product of a mental disease or mental defect.”⁴⁸ Due to the “[b]asic and far reaching questions of public policy” that this claim raised, the court declined the invitation to act, holding this to be a matter for the General Assembly.⁴⁹

The court gave no meaningful explanation to support this judicial inadequacy or an explanation of why a District of Columbia court found itself up to the task while the Maryland court did not. It did, nevertheless, seem inclined to affirm regardless of the legal test applied, as it stressed the appellant’s “hostile, anti-social trends” and “his intoxication prior to the crime” as factors indicating that he acted on his own free will.⁵⁰ Consequently, the court’s lack of sympathy for the

42. Aharon Barak, The Supreme Court, 2001 Term—*Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 29 (2002).

43. See *infra* Part I.A.2.

44. 212 Md. 55, 128 A.2d 437 (1957).

45. 8 Eng. Rep. 718 (1843).

46. *Cole*, 212 Md. at 58, 128 A.2d at 438.

47. 214 F.2d 862 (D.C. Cir. 1954).

48. *Cole*, 212 Md. at 58, 128 A.2d at 439.

49. *Id.*

50. *Id.* at 58-59, 128 A.2d at 439.

defendant and acceptance of the beneficial value of the death penalty might well have better explained its deference to the legislature.⁵¹

There are also cases that point to the legislature as deciding "public policy" in a less exclusive way. These declare that "normally" it should be a legislative decision⁵² or that the legislature has the "primary power" to affect change in the common law.⁵³ This group then looks to other grounds to support a refusal to act, such as long-term legislative silence that purportedly indicates its satisfaction with the status quo.⁵⁴

Directly clashing with these passive pronouncements are the numerous instances in which the court has acted assertively and declared itself the proper determinant of "public policy." An example of a less deferential approach is *Frye v. Frye*,⁵⁵ the court's 1986 decision rejecting a request to abrogate parent-child immunity in the context of a father's alleged negligence in an auto accident.⁵⁶ In *Frye*, the court asserted, without hesitation, its judicial power: "[T]he question whether the parent-child immunity rule in negligence actions like this one should be abrogated by judicial decision calls upon us to determine if it is still justified by the demands of public policy."⁵⁷ Judge Orth then looked to see whether the parent-child relationship had so drastically changed such that public policy required abrogation of the immunity.⁵⁸ The court resolved the public policy issue by finding that immunity was necessary for "the promotion of stability, harmony and peace of the family and to the preservation of parental authority and the family unity [which were] in the best interests of society."⁵⁹

51. Judge Oppenheimer in *White v. King*, interpreted *Cole* as having deferred to the legislature to change to a common-law rule because the court had not found a viable alternative to the *M'Naghten* rule. 244 Md. 348, 355, 223 A.2d 763, 767 (1966).

52. See *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 463, 456 A.2d 894, 905 (1983) (declining to adopt the doctrine of comparative negligence); *Felder v. Butler*, 292 Md. 174, 183, 438 A.2d 494, 499 (1981) (recognizing that a "declaration of public policy is normally the function of the legislative branch of government").

53. See *State v. Wiegmann*, 350 Md. 585, 607, 714 A.2d 841, 852-53 (1998) (refusing to abrogate the common-law right to resist unlawful arrest, explaining that such a change was "best left to the Legislature").

54. See, e.g., *Harrison*, 295 Md. at 461-62, 456 A.2d at 904 (explaining that from 1966 to 1982 the legislature considered twenty-one bills proposing a change from contributory negligence to comparative negligence, and that the legislature's failure to enact any bill suggested that they intended to retain the contributory negligence doctrine).

55. 305 Md. 542, 505 A.2d 826 (1986).

56. *Id.* at 561, 505 A.2d at 836.

57. *Id.* at 552, 505 A.2d at 831.

58. *Id.* at 558, 505 A.2d at 834.

59. *Id.* at 561, 505 A.2d at 836.

The court took a similar activist approach in 1982 in *Moxley v. Acker*,⁶⁰ in which it granted *certiorari* to consider "the important issue of public interest involved" in deciding whether the use or threat of force was a necessary element of the common-law forcible detainer action.⁶¹ In abrogating this requirement, the court paid no deference to the legislature and found on its own that the reason for this element had long disappeared.⁶² It found that the "public policy of Maryland dictates this result."⁶³

In *Boblitz v. Boblitz*,⁶⁴ the court abrogated the common-law rule of spousal immunity in negligence actions.⁶⁵ In so doing, it rejected the dissenters' claim that such a change "involves a matter of public policy," which is "a matter normally for the legislature."⁶⁶ The court in *Jones v. State*,⁶⁷ faced with the continued viability of the common-law rule that an accessory to a crime cannot be convicted of a greater crime than the principal, found there to be "an urgency to establish a rule of future conduct" and resolved on its own this "matter of important public concern."⁶⁸

Defining an opportunity for decision-making as one involving a "public policy," therefore, does not seem to advance the resolution of whether the judiciary or the legislature should be the one to make any necessary change. Because each body regularly engages in determining public policy, affixing this label is no proxy for a suitable allocation of power.⁶⁹ Furthermore, it cloaks the court's reasoning process by offering such a conclusory explanation for judicial inaction.⁷⁰

2. *Judicial Concerns Regarding the Retroactive Effects of Change.*—One understandable judicial concern with any ruling that alters the common law focuses upon the unfairness to those who have shaped their present actions in reliance upon the legal status quo. Thus, a

60. 294 Md. 47, 447 A.2d 857 (1982).

61. *Id.* at 48, 447 A.2d at 857.

62. *Id.* at 52, 447 A.2d at 860.

63. *Id.*

64. 296 Md. 242, 462 A.2d 506 (1983).

65. *Id.* at 275, 462 A.2d at 522.

66. *Boblitz*, 296 Md. at 282, 462 A.2d at 524 (Couch, J., dissenting).

67. 302 Md. 153, 486 A.2d 184 (1985).

68. *Id.* at 158, 486 A.2d at 187.

69. See Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957) ("We should not be misled by the cliché that policy is a matter for the legislature and not for the courts. . . . [When] courts must revise old rules or formulate new ones . . . policy is often an appropriate and even a basic consideration.").

70. A cynic might argue that the assertion of deference in these contexts was a pretext for a dislike of the proposed rule on the merits. One has less responsibility for perpetuating an outmoded rule if one's hands are tied.

change in property law might well alter the existing balance of legal rights and duties between a commercial landlord and its tenant.⁷¹ Similarly, the granting of a new protective right to a criminally accused today might trigger a demand for the same right by a criminal defendant tried yesterday.⁷² Also, the creation of a new cause of action or the abrogation of an immunity defense might open the floodgates to all of those affected who are still within the statute of limitations.⁷³

Today, when the court is exercising its power under Article 5 of the Maryland Declaration of Rights and issues a ruling that changes the State's common law, it ordinarily limits the effect of the change to future occurrences, except as to the parties in the case.⁷⁴ Consequently, when *stare decisis* is abandoned and change is imposed, the abruptness of such change is mollified by imposing the new rule only as to future litigants.⁷⁵ Prospectivity offers some comfort to those concerned that a common-law change will produce an unwanted draconian effect.

As late as the 1950s, however, the Court of Appeals assumed that it had no power to limit its rulings to a solely prospective application.⁷⁶ These concerns generally stemmed from the court's philosophical concept that any new common-law change must be fully retroactive.⁷⁷ Due to its belief that it thought it had no way of remedying these difficulties, the court often used the prospect of disruption and instability as a reason for choosing not to alter a common-law

71. See, e.g., *Julian v. Christopher*, 320 Md. 1, 13, 575 A.2d 735, 741 (1990) (recognizing that an alteration in property law would give the plaintiff-tenants, and all prospective tenants, a benefit that tenants who entered into leases prior to the court's decision would not receive).

72. See, e.g., *Schowgurow v. State*, 240 Md. 121, 131-32, 213 A.2d 475, 482-83 (1965) (explaining that the Constitution does not require or prohibit the State from retroactively applying new legal principles).

73. See, e.g., *Coastal Tank Lines, Inc. v. Canoles*, 207 Md. 37, 50, 113 A.2d 82, 88 (1955) (explaining that a change in law by judicial decision might have the consequence of allowing numerous legal claims beyond the instant case).

74. *Am. Trucking Ass'n v. Goldstein*, 312 Md. 583, 592 n.7, 541 A.2d 955, 960 n.7 (1988); *Williams v. State*, 292 Md. 201, 217, 438 A.2d 1301, 1309 (1981).

75. See, e.g., *Williams*, 292 Md. at 219, 438 A.2d at 1310 (altering Maryland common law allowing waiver of criminal defendants' right to be present at every stage of the trial and stipulating that this change in the law would only apply prospectively).

76. See, e.g., *Fletcher v. Safe Deposit & Trust Co.*, 193 Md. 400, 410, 67 A.2d 386, 390 (1949) (dismissing the notion that judicial decisions do not apply retroactively).

77. See, e.g., *Canoles*, 207 Md. at 50, 113 A.2d at 88 (noting that judicial decisions state the law as it has been from the beginning) (citing *Fletcher*, 193 Md. at 410, 67 A.2d at 390).

rule, regardless of its present-day utility.⁷⁸ This limited view of judicial power compelled an overly rigid adherence to *stare decisis*.

Writing in 1949, Judge Markell presented what he declared to be certain basic principles, from which "[t]his court has never departed."⁷⁹ He deemed it to be "the orthodox theory" that the task of a common-law court is merely to "'declare' the law as it has been from the beginning."⁸⁰ Accordingly, he explained, "'[j]udge-made law' has no date of enactment."⁸¹ Two years later the court reiterated this same concept—that its task in interpreting the common law was to determine "now what the common law of Maryland always has been."⁸² A corollary of this view was that only the legislature had the power to change the law prospectively.⁸³ Accordingly, the court often declined to abrogate a common-law rule, instead deferring to the apparently more flexible legislature.

This legal philosophy discouraged judicial altering of the common law in two major ways. First, constraining the court's range of decision-making merely to the task of determining what the law "always has been," suggests that the common law cannot change over the years and keep pace with changing societal needs. Such a judicial role would be limited to a historical search, rather than an exploration of what rules should best apply today.

Second, because this philosophy required a declaration of the law for all times, it demanded retroactivity of all new common-law rulings. As Illinois Chief Justice Walter Schaefer explained, "Most courts seem to have assumed that a new doctrine cannot be announced judicially unless it is applied retroactively. The assumption is of course a logical offshoot of the theory that what a court does is to state what has always been the law."⁸⁴

Because the element of retroactivity could unfairly interfere with decisions made in reliance upon earlier views of what the law was, the Court of Appeals was reluctant to evoke such broad-reaching change. Thus, in a 1955 appeal, *Coastal Tank Lines, Inc. v. Canoles*,⁸⁵ which challenged the common-law rule last enunciated in 1918 that only husbands could sue for loss of consortium, the court was concerned that

78. See, e.g., *id.* (explaining that reversal of precedent may allow several legal claims not barred by the statute of limitations).

79. *Fletcher*, 193 Md. at 410, 67 A.2d at 390.

80. *Id.*

81. *Id.*

82. *Damasiewicz v. Gorsuch*, 197 Md. 417, 440, 79 A.2d 550, 560-61 (1951).

83. *Canoles*, 207 Md. at 50, 113 A.2d at 88.

84. Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 16 (1966).

85. 207 Md. 37, 113 A.2d 82 (1955).

overruling the 1918 decision would evoke a retroactive change of law reaching beyond the case at hand and would apply to similar cases still within the statute of limitations.⁸⁶ Consequently, *Canoles* refused to update the law and deferred to the legislature, which it deemed to be the only body that could limit its change to prospective application.⁸⁷

The Court of Appeals was not alone at this time in viewing itself as bound by the restraints of retroactivity. The cases were few in which state courts had changed the common law in a solely prospective manner.⁸⁸ The most explicit encouragement for this equitable remedy came from Justice Cardozo's 1932 Supreme Court opinion in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*⁸⁹ Responding to a due process challenge to a Supreme Court of Montana decision, which had refused to retroactively apply its abrogation of precedent, Justice Cardozo declared, "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."⁹⁰ A state court may act whichever way that "injustice or hardship will . . . be averted."⁹¹ Justice Cardozo had earlier written that the decision of prospectivity versus retroactivity should be guided by a "spirit of realism" and an inquiry into each situation's equities, rather than "by metaphysical conceptions of the nature of judge-made law."⁹²

Change eventually came to Maryland in 1965, when the Court of Appeals confronted the retroactivity-prospectivity issue in *Schowgurow v. State*,⁹³ a challenge to the provision of the Declaration of Rights that required jurors to believe in God.⁹⁴ A Buddhist criminal defendant challenged this requirement on Fourteenth Amendment grounds as interpreted by a recent, closely related Supreme Court case.⁹⁵ Speaking through Judge Oppenheimer, the court upheld the constitutional

86. *Id.* at 49-50, 113 A.2d at 88 (declining to overrule *Emerson v. Taylor*, 133 Md. 192, 104 A. 538 (1918), which held that a wife cannot seek damages for loss of consortium when her husband has been injured). *Emerson* was later overruled in part by *Deems v. W. Md. Ry. Co.*, 247 Md. 95, 231 A.2d 514 (1967).

87. *Canoles*, 207 Md. at 50, 113 A.2d at 88.

88. See Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 631-32 (1967) (discussing the fact that few courts applied their decisions non-retroactively and the few instances were compelled by "the strong equities of a particular case").

89. 287 U.S. 358 (1932).

90. *Id.* at 364.

91. *Id.*

92. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 146-49 (1921).

93. 240 Md. 121, 213 A.2d 475 (1965).

94. *Id.* at 123, 213 A.2d at 477.

95. *Id.* In *Torcaso v. Watkins*, the Supreme Court found that a prospective notary public who declined to take an oath of office because it required a belief in the existence of God

challenge, but applied the ruling prospectively, only to the appellant and those whose convictions were not yet final on the date of the issuance of the opinion.⁹⁶

In deciding (apparently for the first time in Maryland) not to apply a new rule retroactively, Judge Oppenheimer relied on Justice Cardozo's *Sunburst* opinion and explained that the question of retroactivity is up to each state.⁹⁷ He also relied upon the Supreme Court opinion in *Linkletter v. Walker*,⁹⁸ which had applied the evidentiary rule of *Mapp v. Ohio*⁹⁹ only prospectively.¹⁰⁰ However, due to the constitutional basis for this ruling on the merits, the court had no opportunity to consider *Canoles'* conundrum of nonconstitutional changes in the common law always having to be retroactive.

When in 1967 the Court of Appeals encountered a renewed attack on the failure of the common law to recognize a woman's right to sue for loss of consortium, it turned to *Schowgurow* for guidance.¹⁰¹ This time the plaintiff challenged the old common-law rule on equal protection grounds.¹⁰² In finally deciding to throw out this gender biased rule, the court in *Deems v. Western Maryland Railway Co.*, again speaking through Judge Oppenheimer, responded to the concerns of *Canoles* and explained that limiting a ruling to prospective application was now permissible.¹⁰³ Citing *Schowgurow*, he noted that, "[s]ince *Canoles*, we have held that a change of law effected by the Court, with limited exceptions, can be made prospectively."¹⁰⁴ The court, therefore, explicitly rejected the notion set forth in *Canoles* that only the legislature possessed this power.¹⁰⁵

was deprived of his rights under the First and Fourteenth Amendments. 367 U.S. 488, 496 (1961).

96. *Schowgurow*, 240 Md. at 132, 213 A.2d at 482.

97. *Id.* at 132, 213 A.2d at 482 (citing *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932)).

98. 381 U.S. 618 (1965).

99. 367 U.S. 643 (1961).

100. *Schowgurow*, 240 Md. at 132, 213 A.2d at 482-83.

101. *Deems v. W. Md. Ry. Co.*, 247 Md. 95, 231 A.2d 514 (1967).

102. *Id.* at 99, 231 A.2d at 516.

103. *Id.* at 115, 231 A.2d at 525.

104. *Id.* at 113, 231 A.2d at 524 (citing *Schowgurow*, 240 Md. at 131-34, 213 A.2d at 482-84; *Schiller v. Lefkowitz*, 242 Md. 461, 219 A.2d 378 (1966)).

105. Judge Oppenheimer also relied upon his opinion in *Schiller v. Lefkowitz*, which discussed the prospectivity-retroactivity issue in a civil suit seeking the benefit of the *Schowgurow* rule regarding a civil juror's belief in God. 242 Md. at 463-66, 219 A.2d at 379-81. In passing, Oppenheimer noted in *Schiller* that purely prospective rulings, i.e., those not giving the appellant the benefit of the rule change, suffer from three defects because they: (i) make the opinion a "prophesy instead of an adjudication," (ii) "chill[] legitimate attacks upon a law believed to be erroneous," and (iii) create unfairness for the litigant who brought the challenge. *Id.* at 466, 219 A.2d at 381.

Deems was not the usual case of a court disregarding *stare decisis* and overruling a prior precedent. Due to what the Court of Appeals perceived as a serious constitutional issue, it construed Maryland's common law to permit a woman to recover for the loss of consortium due to the injury of her husband.¹⁰⁶ Thus, constitutional overtones were present, just as in *Schowgurow*.

Despite the court's apparent abandonment of its retroactivity viewpoint, a year later in *Howard v. Bishop Byrne Council Home, Inc.*,¹⁰⁷ it regressed by identifying the ability of the legislature to make change prospectively as an advantage of leaving change to that body.¹⁰⁸ Judge Oppenheimer was no longer on the court to remind it of the thirty-year precedent of *Sunburst*. Later yet, in 1979, the court was still referring to the legislature's assumed unique ability to grant prospective relief, but this time only as a modest add-on to other more logical grounds for deference to the legislature.¹⁰⁹

Today, however, when the Court of Appeals is exercising its Article 5 powers by changing the common law, it has declared, "[o]rdinarily, except as to the parties before the court, such decisions are fully prospective."¹¹⁰ At present, therefore, due to the remedial options permitted by the court, concerns regarding the unfairness of retroactive effect should have no role to play in the court's decision to defer to the legislature when asked to change the common law.

3. *The Legislature as a More Competent Body.*—A far more constructive contention supporting judicial deference would be that the legislature is better equipped as a decision maker to reach an appropriate result. This approach focuses on the differing deliberative processes available to each body, and urges that legislative decision-making is often of a higher order than that of the courts. Over the years, the court has on occasion voiced its preference for legislative resolution in three related settings. First, it has asserted that the process and functioning of the legislature produce wiser laws. Second, it has suggested that the legislature can make better selections than

106. *Deems*, 247 Md. at 113, 231 A.2d at 524.

107. 249 Md. 233, 238 A.2d 863 (1968).

108. *Id.* at 242, 238 A.2d at 868 (citing *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530, 533 (Tex. 1966)).

109. *Austin v. Mayor of Baltimore*, 286 Md. 51, 57, 405 A.2d 255, 258 (1979) (citing *Geier v. Mercantile-Safe Deposit & Trust Co.*, 273 Md. 102, 124, 328 A.2d 311, 323 (1974)).

110. *Am. Trucking Ass'ns v. Goldstein*, 312 Md. 583, 592 n.7, 541 A.2d 955, 960 n.7 (1988); see also *Julian v. Christopher*, 320 Md. 1, 10, 575 A.2d 735, 739 (1990) (stating that "[o]rdinarily decisions which change the common law apply prospectively, as well as to the litigants before the court").

courts when multiple versions of a new rule are available and only one can be chosen. A third companion argument is that only the legislature can best enact multi-faceted laws that take into account the many collateral consequences that a single legal change might effect, as when a change in area *A* may need a corresponding correction to indirectly related area *B*.

The first argument concerning process emphasizes that an appellate court most often finds itself confined in its decision-making to the narrow picture presented by two parties. In this bipolar configuration, it is usually unable to hear from other voices in this or related controversies, quite unlike a popularly elected legislature. The court has infrequently discussed this difference between the two systems. On one occasion, in *State v. Minster*,¹¹¹ the Court of Appeals proposed several advantages that more readily adhered to the legislative process: "The legislature may hold hearings on this matter; they can listen to the testimony of medical experts; and they may determine the viability of this rule in modern times."¹¹² The court did not, however, further analyze this comparison.

The court's second articulated impediment to judicial resolution is its lesser ability to choose the best new rule from among several available options. Although this has concerned the court on a few occasions, it has generally posed no problem. Again, in *State v. Minster*, the prosecution sought to obtain judicial abolition of the ancient common-law rule that a criminal defendant is not liable for murder if the victim dies more than a year and a day after the crime.¹¹³ In declining the invitation, the *Minster* court found itself faced with several options for replacing the rule: (i) setting a lengthier time limit, (ii) reducing the rule to contain a rebuttable presumption, rather than an irrebuttable one, (iii) or abolishing it and leaving causation to the jury.¹¹⁴ Because it found a "great difference of opinion"¹¹⁵ as to which was the best option, it left any change to legislative hands.¹¹⁶

111. 302 Md. 240, 486 A.2d 1197 (1985).

112. *Id.* at 246, 486 A.2d at 1200.

113. *Id.* at 241, 486 A.2d at 1197.

114. *Id.* at 245, 486 A.2d at 1199 (citing *People v. Stevenson*, 331 N.W.2d 143, 146-47 n.7 (Mich. 1982)).

115. *Id.* From the context of this reference it appears that the court meant that other jurisdictions are split as to the proper rule. It may, however, also have been saying that the seven Court of Appeals judges themselves were divided as to which was the best rule. *See id.*

116. Nevertheless, the court reported, five other state courts had abolished the rule, while in eleven states the rule had been abrogated by legislative action or inaction. *Id.* at 246, 486 A.2d at 1200.

The legislature's proclaimed better ability to deal with a multiple-option remedy was one of the several reasons given by the court in 1968 in *Howard*, which declined to abolish the charitable immunity defense.¹¹⁷ Noting that many states that had changed the common-law rule had produced modifications that depended on the type of negligence, the nature of the charitable institution, and the existence of liability insurance, the *Howard* court concluded that the legislature was better able to select among the classifications of charitable institutions and prescribe limits of liability.¹¹⁸

In near similar settings, however, the court has shown no lack of confidence in its ability to resolve broad-ranging, multiple-option issues. For example, the court's partial abrogation of spousal immunity was uninhibited by the need to select from the various forms it could take. As the dissent in *Boblitz v. Boblitz* demonstrated, the General Assembly had previously considered and rejected several different proposals to abrogate, including bills to permit suit (i) for torts incurred prior to marriage, (ii) for assault and battery only, (iii) for assault and battery torts filed after divorce proceedings had commenced, (iv) for intentional torts in general, and (v) for all torts.¹¹⁹ In deciding to partially abrogate immunity, the majority did so "as to cases sounding in negligence . . . accruing after the date of the filing of the opinion in this case."¹²⁰ It, therefore, proved able to pick and choose from the available options.

Litigants seeking judicial abolition of parent-child immunity have similarly presented courts with a broad array of options.¹²¹ Courts across the nation have chosen: (i) full abrogation, (ii) abrogation only in motor torts, (iii) abrogation only in motor torts to the extent of insurance, (iv) full abrogation except regarding parental authority/discretion, (v) abrogation only in business claims, (vi) abrogation only for a parent's cruel, outrageous behavior, and (vii) other limitations.¹²² Courts also have withdrawn immunity from stepparents and non-custodial parents.¹²³ The "modern trend" is for courts to exclude

117. 249 Md. 233, 241-42, 238 A.2d 863, 868 (1968).

118. *Id.* at 241-42, 238 A.2d at 867-68. A decision to fully abolish the defense, however, would be unaffected by these variables. One desiring only to take half-way positions would be worried by this limitation.

119. 296 Md. 242, 287 n.4, 462 A.2d 506, 527 n.4 (1983) (Couch, J., dissenting).

120. *Boblitz*, 296 Md. at 275, 462 A.2d at 522.

121. *See, e.g.,* *Mahnke v. Moore*, 197 Md. 61, 64-67, 77 A.2d 923, 924-26 (1951) (tracing the development of parent-child immunity after 1816).

122. These options are listed in the 1994 survey of nationwide case law set forth in *Warren v. Warren*, 336 Md. 618, 627 n.2, 650 A.2d 252, 256 n.2 (1994).

123. *Id.* at 628, 650 A.2d at 257 (stepparents); *id.* at 630, 650 A.2d at 258 (non-custodial parents).

motor torts from parent-child immunity.¹²⁴ The majority of the states that have abrogated the immunity have done so by judicial decision.¹²⁵

On the two recent occasions in which the court has declined to abrogate the immunity, it has not rested its result upon a better legislative ability to choose from amongst these alternatives. The most recent case, *Warren v. Warren*, made no mention of need to defer to the legislature at all.¹²⁶ A case eight years earlier, *Frye*, announced that it was for the court to determine what public policy required.¹²⁷

The court's third ground for preferring a legislative solution stems from its view that the legislature possesses a better vantage for effecting a complex, final resolution. Many unsuccessful challenges to the rule of qualified municipal immunity have been rebuffed in this fashion. In *Jekofsky v. State Roads Commission*¹²⁸ the court articulated several reasons for the superior ability of the legislature to change the rule: "there are fiscal considerations, administrative difficulties and other problems in balancing the rights of the State and its agencies with new possible rights of the individual citizens, which can far better be considered and resolved by the legislative branch"¹²⁹ A ruling with only prospective effect would, however, have permitted the municipalities to insure themselves. Balancing the various rights is a usual need in judicial activities. The court was not more forthcoming in explaining the root of the judicial shortcomings. Nor did it explain how other state courts have been able to eliminate municipal immunity without great disruption.¹³⁰ It also overlooked the fact that it had already taken a first step in modifying municipal immunity by limiting it to "governmental" as opposed to "proprietary" functions.¹³¹

124. *Frye v. Frye*, 305 Md. 542, 562, 505 A.2d 826, 836-37 (1986).

125. *Id.* at 562-63, 505 A.2d at 836-37.

126. *See Warren*, 336 Md. 618, 650 A.2d 252. However, the court did discuss legislative policies promoting family stability and unity, noting the court's prior reliance on state policy for refusing to abrogate parent-child immunity. *Id.* at 624-25, 650 A.2d at 255.

127. *Frye*, 305 Md. at 552, 505 A.2d at 831. However, the court did partially defer to the legislature on the matter of excluding motor torts from the parent-child immunity to avoid "carfuffling" the legislature's elaborate insurance scheme. *Id.* at 567, 505 A.2d at 839.

128. 264 Md. 471, 287 A.2d 40 (1972).

129. *Id.* at 474, 287 A.2d at 42, *cited with approval* by *Austin v. Mayor of Baltimore*, 286 Md. 51, 55, 405 A.2d 255, 257 (1979).

130. *See, e.g., Haney v. Lexington*, 386 S.W.2d 738, 741 (Ky. Ct. App. 1965) (examining the effect of abrogating municipal immunity).

131. *See Katz v. Wash. Suburban Sanitary Comm'n*, 284 Md. 503, 508 n.3, 397 A.2d 1027, 1030 n.3 (1979) (citing *O & B, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 279 Md. 459, 369 A.2d 553 (1977); *Robinson v. Bd. of County Comm'rs*, 262 Md. 342, 278 A.2d 71 (1971)).

The court in *Frye* deferred in part to the legislature in deciding whether to abrogate parent-child immunity.¹³² It suggested that the most likely choice for partial abrogation would apply to motor torts. Because, however, the exclusion of motor torts from the immunity “would inevitably have some impact on the [automobile] insurance scheme” established by the legislature, it would not be appropriate for the court to resolve these broader issues.¹³³

On the other hand, the court failed to show such reticence in 1983 when it partially abrogated the intraspousal immunity in *Boblitz*, which also would surely profoundly affect liability insurance matters.¹³⁴ *Frye* also failed to address how those courts following the “modern trend” have been able to maneuver this situation.¹³⁵ Indeed, eight years later, when another plaintiff raised the identical issue, the court chose to retain the immunity on the merits, with nothing said of judicial restraint.¹³⁶ It is, therefore, difficult to place too much significance on this reference to legislative deference.

Similarly, the court has not complained of encountering unusual difficulty in piecing together its complex matrix of rights and duties between property owners and those who come on their land or personal property. The court has divided those plaintiffs who are hurt on another’s land into four categories: invitee, licensee by invitation, bare licensee, and trespasser.¹³⁷ The duties owed to each person by the property owner vary from an ordinary standard of care owed to the invitee to the duty merely to refrain from willful and entrapping acts.¹³⁸ This matrix is then made more complicated when dealing with another’s personal property or with persons on another’s land.¹³⁹

132. 305 Md. 542, 565-66, 505 A.2d 826, 838 (1986). The court voiced strong support for preservation of the immunity: “The bases on which the rule was adopted over fifty years ago remain as valid now as they were then.” *Id.* at 565, 505 A.2d at 838. This may indicate that its reference to legislative prerogative was an after-the-fact rationalization for a decision already made on the merits and having little to do with judicial process.

133. *Id.* at 567, 505 A.2d at 839. The court did note that its withdrawal of the immunity from instances in which a parent injures his or her child in a cruel and inhumane manner, *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951), would not have a collateral affect on legislative insurance schemes. *Frye*, 305 Md. at 566, 505 A.2d at 839.

134. *Frye*, 305 Md. at 564, 505 A.2d at 838.

135. *See id.*

136. *See Warren v. Warren*, 336 Md. 618, 626-28, 650 A.2d 252, 256-57 (1994) (refusing to abrogate parent-child immunity and refusing to expand the scope to include stepparents, regardless of their legal status to the child).

137. *See, e.g., Wagner v. Doehring*, 315 Md. 97, 101-02, 553 A.2d 684, 686 (1989) (reviewing duty of care owed to different classes of people on a property owner’s land).

138. *Id.* at 102, 553 A.2d at 686-87.

139. *See, e.g., Baltimore Gas & Elec. Co. v. Flippo*, 348 Md. 680, 700-02, 705 A.2d 1144, 1154-55 (1998) (holding that a child who was shocked by electric wires while climbing a

This complex arrangement, which is as involved as many a piece of legislation, affects a multitude of competing interests.

* * *

The court has consequently been far from consistent in the manner by which it justifies its active or passive approach to changing the common law. It has generally come out on both sides of the divide without announcing and adhering to a uniform set of principles. It, next, should be explored just how consistent it has been in deferring to the legislature when that body is deemed to have precluded judicial change by asserting a legislative intent to preempt the area of law at issue.

B. When the Court Determines that the Legislature Has Shown an Intent to Control

The legislature's ability, within constitutional limits, to have the final word in defining Maryland law gives it a preferred status over the judiciary in defining the rights and obligations of the State's citizenry. Accordingly, if the legislature stakes out an area of interpersonal activity for its regulation, assuming its efforts are constitutional, the judiciary must defer to its command. Thus, wherever the legislature evinces its intent to be the sole source of the law, the courts must yield to this branch of government.

Whenever judicial alteration of the existing common law is suggested, therefore, a court should first ask if the legislature has already preempted the area through legislative enactment or a more passive indication of intent. The fact patterns of the thirty-three studied cases indicate that the basic forms for the expression of legislative intent have fallen into four categories, listed in order of progressively clearer preemption: (1) where the General Assembly has never acted for or against the existing common-law rule; (2) where there have been unsuccessful legislative efforts to change the common-law rule; (3) where the General Assembly has enacted partial change to a common-law rule; and (4) where the General Assembly has extensively legislated throughout the field.

1. The Significance of Total Legislative Inaction.—One standard pattern involves an older common-law rule that states other than Ma-

tree on a friend's property was a licensee by invitation in the tree, not a trespasser to the electric company's easement, and therefore, the electric company had a duty to the child to exercise a high degree of care).

ryland have begun in large numbers to change, and litigants have asked the Court of Appeals to change. The court has deferred to the legislature on each of these past occasions, and the legislature has not acted. In these situations the record does not reflect any legislative attempt to effect change. Apparently, no bills were introduced. The arguable evidence of intent in this fact pattern, therefore, would be that the legislature was aware of choices being made by other states and of the court's decisions to maintain the older common-law rule. It might be said that inaction in this context would create the inference of a legislative preference for the status quo.

The instances of national movements away from old common-law rules include the enactment of Dram Shop laws,¹⁴⁰ abrogation of the parent-child¹⁴¹ and municipal immunities,¹⁴² and abolition of the distinctions favoring the masterminds of a crime who were absent from its scene over those who carried it out.¹⁴³ When litigants were asking for Maryland to join the rest of the nation regarding these rule changes, the Court of Appeals has been one of the few still resisting change. Some of its opinions have inferred from this pattern a legislative awareness of the national trend and a considered refusal to join in.¹⁴⁴

With most of these cases and others, the court on numerous occasions had already refused to change and had frequently announced that it was only for the legislature to take such a step.¹⁴⁵ Similarly, some court opinions have found a legislative intent to maintain the status quo from this additional failure to take up the "invitation." Repelling a 1979 request to abolish municipal immunity, the court in

140. See *infra* notes 187-195 and accompanying text (discussing the court's refusal to set aside liquor laws when there was a clear intent by the legislature to regulate a specific area).

141. See *supra* notes 121-127, 132-136 and accompanying text (discussing the court's refusal to abrogate parent-child immunity despite a modern trend toward abrogation).

142. See *also supra* notes 128-131 and accompanying text (discussing the Maryland court's unwillingness to modify municipal immunity as other states had).

143. See *supra* notes 5-13 and accompanying text (discussing the court's refusal in *State v. Sowell* to abolish the rule treating principals of a crime harsher than the accessories despite its outlived purpose); see *also supra* notes 67-68 and accompanying text (discussing whether to abrogate a common-law rule preventing an accessory to a crime from being convicted of a greater crime than the principal).

144. See, e.g., *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 456, 456 A.2d 894, 901 (1983) (refusing to join other states' courts and legislatures who have adopted comparative negligence and abandoned contributory negligence).

145. See, e.g., *Austin v. Mayor of Baltimore*, 286 Md. 51, 55-58, 405 A.2d 255, 257-59 (1979) (noting five occasions over twenty years in which the municipal tort liability rule had been challenged).

Austin v. Mayor of Baltimore included this legislative inference among its reasons not to change. It found significance in the following:

The General Assembly is certainly aware of the reasons which have been advanced for the abrogation of the doctrine and of its alteration, modification or abolishment in many other states, but it has permitted its tenants with respect to municipal tort liability to stand and has chosen not to act in the face of repeated reminders of its role in the matter in the opinions of this Court.¹⁴⁶

Similarly, the court in *State v. Weigmann*¹⁴⁷ emphasized that the General Assembly "is presumed to be cognizant" of the court's past opinions that criticized the common-law right to resist an unlawful arrest, yet declined to abolish it.¹⁴⁸ *Weigmann* implied that the legislature's failure to respond to this criticism was an indication of legislative satisfaction with the long-standing rule.¹⁴⁹

Juxtaposed with these instances of judicial deference to legislative silence are the occasions in which, despite a similar history, the court assumed an activist stance and overruled the outmoded common-law rule. Between 1927 and 1968, parties had mounted at least six unsuccessful judicial challenges to the rule of spousal immunity.¹⁵⁰ This did not prevent the court in 1978 in *Lusby v. Lusby*¹⁵¹ from carving a major exception to the doctrine, and then almost abandoning the doctrine in *Boblitz* in 1983.¹⁵² The court's past practices when determining whether to alter the common law, therefore, provide no consistent guidance of how to proceed when faced with legislative silence.

2. *The Significance of Unsuccessful Legislative Efforts.*—One notch above this pattern of inaction is the situation in which there has been some marginally successful legislative activity. Chief Judge Murphy's majority opinion in *Harrison* posed a classic instance of the court de-

146. *Id.* at 55, 405 A.2d at 257.

147. 350 Md. 585, 714 A.2d 841 (1998).

148. *Id.* at 606, 714 A.2d at 851.

149. *See id.* The court agreed with this statement a year later in *State v. Sowell*, 353 Md. 713, 723-24, 728 A.2d 712, 717-18 (1999). *Weigmann* cited *Harrison* as authority for this passive inference of intent. *Weigmann*, 350 Md. at 605, 714 A.2d at 850-51. *Harrison*, however, involved a setting in which the legislature had rejected at least twenty-one attempts to replace the common-law contributory negligence with comparative negligence. *Harrison*, 295 Md. at 462, 456 A.2d at 904. Conversely, the court in *Weigmann* deferred to the legislature on whether to abrogate the common-law rule permitting a person to resist an unlawful arrest. *Weigmann*, 350 Md. at 607, 714 A.2d at 851-52.

150. *See Lusby v. Lusby*, 283 Md. 334, 340-45, 390 A.2d 77, 80-82 (1978).

151. 283 Md. 334, 390 A.2d 77.

152. 296 Md. 242, 275, 462 A.2d 506, 522 (1983).

ciding that legislative failure to act indicated a legislative approval of the status quo.¹⁵³ *Harrison* "buttressed" its decision not to abandon the common-law rule of contributory negligence by looking at the legislature's failure over the preceding sixteen years to enact comparative negligence legislation.¹⁵⁴ During that time, the General Assembly had considered twenty-one comparative fault bills, none of which was enacted. Only two had emerged from committee.¹⁵⁵ The court concluded, "[a]lthough not conclusive, the legislature's action in rejecting the proposed change is indicative of an intention to retain the contributory negligence doctrine."¹⁵⁶

A long history of legislative failure, however, did not deter the court in *Boblitz*, which abrogated the interspousal immunity in negligence actions.¹⁵⁷ Over a period of twenty-four years prior to its 1983 ruling, seven bills had been introduced in the General Assembly to accomplish all or part of this result.¹⁵⁸ Only one of these ever emerged from committee; that bill passed the Senate but died in committee in the House.¹⁵⁹ Nevertheless, without even addressing this history, or its import in evidencing legislative intent, the majority stepped in and pronounced a major change to the common-law immunity rule.¹⁶⁰ Only Judge Couch in his dissenting opinion made reference to this legislative history.¹⁶¹

Thus, just as in the case of total legislative silence, when the legislature has failed to enact a statute, the court can be found on both sides of the issue of whether this behavior evinces legislative intent to preclude change.

3. *Partial Legislative Change.*—Far more revealing of legislative intent are those instances in which the General Assembly has, in fact, enacted statutory change. Where the common-law elements of a claim are *A*, *B*, *C* and *D*, but the legislature has deleted *D* and replaced

153. *Harrison*, 295 Md. at 462, 456 A.2d at 904.

154. *Id.*

155. *Id.* at 462 n.13, 456 A.2d at 904 n.13. One bill passed the House of Delegates by a 114-to-8 vote, but died in the Senate Judicial Proceedings Committee. *Id.* (quoting Edward S. Digges, Jr. & Robert Dale Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 Md. L. REV. 276, 294 n.87 (1982)).

156. *Id.* at 462, 456 A.2d at 904.

157. *Boblitz*, 296 Md. at 275, 462 A.2d at 522.

158. *Id.* at 287, 462 A.2d at 527 (Couch, J., dissenting).

159. *Id.* at 287 n.4, 462 A.2d at 527 n.4.

160. *Boblitz*, 296 Md. at 275, 462 A.2d at 522.

161. *Id.* at 287, 462 A.2d at 527 (Couch, J., dissenting). The court had similarly cast a blind eye on the four failed attempts to abolish interspousal immunity prior to 1978, when it carved out a major exception to the doctrine in *Lusby*. See 283 Md. 334, 337-46, 390 A.2d 77, 78-83 (1978) (determining whether to abrogate spousal immunity).

it with *E*, for example, there can be little doubt but that the legislature prefers *E* over *D*. Consequently, the Maryland judiciary would be acting beyond its Article 5 limits if it were to ignore this preference and maintain an adherence to *D*. More difficult to answer, however, is whether the legislature's change of *D* to *E* indicates its evaluation and approval of *A*, *B* and *C*. Could the court now alter element *A* without encroaching upon the legislative domain? Indeed, could the legislative change be read even more broadly as an indication of an intent to preempt the entire area of law in which the *A-B-C-E* claim resides? Has the legislature's change of item *E* signaled an intent to preclude any judicial change of related matters?

When responding to requests to alter common-law rules, the court has frequently encountered variations of this pattern of partial legislation. As is shown below, however, its methods of resolving these issues have not been models of consistency.

Answering a challenge to the doctrine of charitable tort immunity, the court in *Howard* allotted the legislature a wide berth in ascertaining its intent to preempt an area from further judicial development.¹⁶² The immunity doctrine was itself of judicial origin, first articulated by the court in 1885 and reaffirmed in 1917.¹⁶³ In 1947, the General Assembly enacted the first exception to the defense, declaring that an insurer of a charity could not assert the immunity defense.¹⁶⁴ Later in 1965, the legislature declared that hospitals that carried at least \$100,000 in insurance would be immune from liability for amounts beyond that limit.¹⁶⁵ The General Assembly had not articulated any new rule for other charities or differentiated the types of torts or other claims that were immune from suit. According to *Howard*, however, these two legislative alterations of the common law were sufficient to indicate legislative preemption and satisfaction with the rest of the common law in this area.¹⁶⁶

Sharply contrasting with *Howard's* judicial reasoning is one of the court's most assertive judicial efforts. In *Phipps v. General Motors*

162. 249 Md. 233, 241-42, 238 A.2d 863, 867-68 (1968).

163. *Perry v. House of Refuge*, 63 Md. 20, 28 (1885) (adopting the immunity doctrine); *Loeffler v. Trs. of Sheppard & Enoch Pratt Hosp.*, 130 Md. 265, 274, 100 A. 301, 304 (1917) (reaffirming *Perry* and upholding the charitable immunity doctrine).

164. See *Howard*, 249 Md. at 236, 238 A.2d at 864 (citing Md. ANN. CODE art. 48A, § 85 (1947) repealed and reenacted as MD. ANN. CODE of 1957, art. 48A, § 480 (1963)). This statute was recently reenacted by 1996 Md. Laws ch. 11 (codified at MD. CODE ANN., INS. § 19-103 (2002)).

165. *Howard*, 249 Md. at 241, 238 A.2d at 868 (citing MD. ANN. CODE of 1957, art. 43, § 556A (1965)). This statute is now codified at MD. CODE ANN., CTS. & JUD. PROC. § 5-632 (2002).

166. *Howard*, 249 Md. at 241-42, 238 A.2d at 868.

Corp.,¹⁶⁷ the court declined to recognize that existing legislative rulemaking preempted the products liability field and adopted section 402A of the *Restatement (Second) of Torts*' theory of strict liability.¹⁶⁸ *Phipps* even appears to have adopted a presumption that, absent a clear expression to the contrary, the General Assembly does not intend to preempt a legal area.¹⁶⁹

The defendant in *Phipps* asked the court not to recognize under Maryland law a cause of action under section 402A for products liability.¹⁷⁰ It asserted that the legislature, by enacting the warranty provisions of Maryland's Uniform Commercial Code, had preempted this area from further judicial activity.¹⁷¹ While this issue had been posed to the court on at least four prior occasions between 1969 and 1975, each time the court had found it unnecessary to address the matter.¹⁷² The General Assembly had failed to act during this period.

In 1963, however, the legislature adopted the UCC with its seller warranty duties that gave an action to a consumer for personal injuries due to defective products.¹⁷³ This contract-law remedy differed in several respects from that under section 402A.¹⁷⁴ It, for example, required the buyer to give notice of a defect to the seller, permitted the seller to disclaim or limit some remedies for breach of warranty, and had a differing statute of limitations.¹⁷⁵

Despite this fairly significant subject-matter overlap, the court rejected the preemption argument, noting that there is no indication that the legislature, in enacting the Uniform Commercial Code, intended to prevent the further development of product liability law by the courts.¹⁷⁶ *Phipps*, therefore, assumed nothing regarding preemption. Instead, it required a positive legislative statement of intent to

167. 278 Md. 337, 363 A.2d 955 (1976).

168. *Id.* at 350, 353, 363 A.2d 962, 963; *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

169. *See Phipps*, 278 Md. at 350, 363 A.2d at 962.

170. *Id.* at 348-49, 363 A.2d at 961.

171. *Id.*

172. *Id.* at 346-48, 363 A.2d at 960-61 (citing *Telak v. Maszczenski*, 248 Md. 476, 237 A.2d 434 (1968); *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969); *Volkswagen of Am., Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974); *Frericks v. Gen. Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975)).

173. *Id.* at 349, 363 A.2d at 961-62.

174. *Id.*

175. *Id.* at 349-50, 363 A.2d at 962.

176. *Id.* at 350, 363 A.2d at 962.

preempt in order for a court to honor such a claim¹⁷⁷—a far more extreme approach than in *Howard*.

The activist side of the court reappeared a few years later in *Adler v. American Standard Corp.*,¹⁷⁸ in which it recognized for the first time a cause of action for wrongful termination of employment.¹⁷⁹ The canvas upon which *Adler* drew consisted of the doctrine of employment at will, which at common law permitted an employer to summarily fire an employee for any or no reason.¹⁸⁰ However, the General Assembly had carved out several exceptions to this rule. It enacted statutes prohibiting employers from adversely affecting an employee, due to race, sex, or disability discrimination;¹⁸¹ for filing a workers compensation¹⁸² or occupational safety claim;¹⁸³ for having to serve on jury duty;¹⁸⁴ and for being subject to certain attachments.¹⁸⁵

Despite this broad array of legislative activity directly related to the issue at hand, Chief Judge Murphy's opinion in *Adler* failed to address whether it amounted to legislative preemption. Surely one could argue that the legislature had completely filled in its picture of how employee-employer rights should be balanced. Its list readily could have been deemed exhaustive.¹⁸⁶ Because the legislature had actively regulated the area of employee termination rights far more extensively than it had the defense of charitable immunity, it is difficult to gain guidance from the court's seemingly contradictory approaches to legislative intent that *Adler* and *Howard* present.

4. *Full Legislative Regulation.*—The context most indicative of legislative intent to regulate an area fully—to the exclusion of judicial intervention—exists where the legislature has, in fact, enacted statutes

177. *Id.* *Phipps* also rejected the argument that the adoption of section 402A would be "such a radical change of the rights of sellers and consumers that the matter should be left to the Legislature." *Id.* To do so, it explained how strict liability was in fact "not a radical departure from traditional tort concepts." *Id.* at 351, 363 A.2d at 963.

178. 291 Md. 31, 432 A.2d 464 (1981).

179. *See id.* at 47, 432 A.2d at 473.

180. *Id.* at 35, 432 A.2d at 467.

181. *Id.* (citing MD. ANN. CODE of 1957, art. 49B, § 16(a)(1) (1979)).

182. *Id.* at 35 n.1, 432 A.2d at 467 n.1 (citing MD. ANN. CODE of 1957, art. 101, § 39A (1979)).

183. *Id.* (citing MD. ANN. CODE of 1957, art. 89, § 43 (1979)).

184. *Id.* (citing MD. CODE ANN., CTS. & JUD. PROC. §§ 8-105, 8-401 (1980)).

185. *Id.* (citing MD. CODE ANN., COM. LAW II § 15-606 (1980)).

186. *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 241-42, 238 A.2d 863, 868 (1968). To quote *Howard*, the court might well have decided that "the General Assembly has completely investigated the [employee rights] question, and the present statutes are tangible evidence that the Legislature arrived at a solution which it deemed satisfactory." *Id.*

that comprehensively cover most aspects of that activity. The court in 1951, in *State v. Hatfield*,¹⁸⁷ suggested just such a fully preempted legislative area: the regulation of liquor sales and usage.¹⁸⁸ *Hatfield* rebuffed on the merits a plaintiff's negligence claim against a licensed vendor of intoxicating beverages for injuries suffered in a vehicle accident caused by a drunken patron who had recently left the tavern.¹⁸⁹ The court held that the tavern's act of selling to the intoxicated driver was too remote a cause of the plaintiff's harm to impose tort liability.¹⁹⁰

Nevertheless, on the process issue of whether there should be a role for the courts in recognizing such a cause of action, the court declared that any such action would be a usurpation of legislative power.¹⁹¹ At the root of its reasoning was its assumed factual history that "[i]n the course of the last hundred years there probably has seldom, if ever, (except during prohibition) been a regular session of the General Assembly at which no liquor laws were passed."¹⁹² *Hatfield*, therefore, viewed itself as facing an area in which the legislature had all but openly declared full preemption.¹⁹³ Thirty years later, in *Felder v. Butler*,¹⁹⁴ when another plaintiff reasserted the same claim to a viable negligence action, the court again demurred, finding that any new rule would interfere with "a subject long pervasively regulated by the legislature."¹⁹⁵

The court's rule appears to be uncontradicted: where there has indeed been pervasive legislative regulation, considering that body's supervening authority in setting the law, the judiciary must defer. Such clear legislative intent will be treated as an unambiguous message of sole control by that branch of government.

C. *The Court's Standard for Invoking Judicial Change*

Assuming that the appellate court has determined that it is competent to evaluate the adoption of a new common-law rule, and that

187. 197 Md. 249, 78 A.2d 754 (1951).

188. *Id.* at 256, 78 A.2d at 757.

189. *Id.*

190. *Id.* at 254-55, 78 A.2d at 756-57.

191. *Id.* at 256, 78 A.2d at 757.

192. *Id.* The court presented no supporting authority for this rather extreme declaration.

193. *Hatfield* also relied upon the dubious indicator of intent that the legislature is deemed to have been aware of similar legislative efforts in other states, and its inaction implied a choice not to adopt the cause of action. *Id.*

194. 292 Md. 174, 438 A.2d 494 (1981).

195. *Id.* at 183, 438 A.2d at 499.

the legislature has not forbidden such action by having preempted the area, the question remains: what deference is to be given *stare decisis*? In other words, what standard of judicial review should the court adopt to measure when the challenger has met his or her claim that change is appropriate?

The court has been less than uniform in articulating a specific standard for application in this situation. On some occasions, when faced with a challenge to a common-law rule, the court has said nothing of any standard that might restrict its ability to overrule old precedent. Instead, it has plunged forward and acted as it were deciding the issue *de novo*. On other occasions, however, it has approached this task by articulating a far more deferential, self-restricting approach. In this last set of instances, it has placed a serious burden on the challenger to the status quo.

The major enunciation of this latter approach came in 1983 in *Harrison v. Montgomery County Board of Education*,¹⁹⁶ a challenge to the complete tort defense of contributory negligence, which was strongly fought by the plaintiffs' bar and supported by the insurance industry. Chief Judge Murphy's articulated guidelines for judicial decision-making appeared to impose significant restraints on the court. He asserted that the court should only change the common-law status quo if "in light of changed conditions or increased knowledge, . . . the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."¹⁹⁷

This would appear to require a far greater showing than the new rule was better than the old. Instead, the benefits of the discarded rule would apparently have to be nearly beyond support. Its merits would have to be not just debatable, but "unsound" and inapplicable to modern life. Furthermore, references to a "vestige" of the past that are unsuited to "modern" life would appear to exclude change when the old rule was also unsound for its earlier times, a mistake regardless of its timing. The *Harrison* court determined that the strength of the argument for abrogating the contributory negligence defense did not rise to this level.¹⁹⁸ It was not, in essence, an artifact without modern utility.

Harrison's "vestige of the past" language has repeatedly been quoted by later cases confronted with this issue. Indeed, it has been

196. 295 Md. 442, 456 A.2d 894 (1983).

197. *Id.* at 459, 456 A.2d at 903 (citing *Williams v. State*, 292 Md. 201, 438 A.2d 1301 (1981)).

198. *Id.* at 463, 456 A.2d at 905.

reiterated by the court at least twice in recent years.¹⁹⁹ Nevertheless, it would appear to be an overstatement, which has been followed only in unconsidered words, and not by purposeful action.

The text of the phrase itself was followed by citations to four Court of Appeals cases that, in fact, overturned common-law rules.²⁰⁰ Thus, referring to occasions of judicial activism would be inconsistent with the court's intent to send a message of judicial restraint. Reading overly restrictive intent into *Harrison* is also at odds with two of Chief Judge Murphy's prior prominent opinions in which he and the court opted to diverge dramatically from the common law and recognize in Maryland totally new causes of action. In the 1977 case of *Harris v. Jones*,²⁰¹ in which the court first recognized the tort of intentional infliction of emotional distress,²⁰² the Chief Judge's opinion for the majority failed even to consider the issue of deference to *stare decisis*. It merely analyzed the arguments for and against the new tort, chose its appropriate bounds, and then endorsed it. The opinion gave no hint that a judicial change to the common law required the surmounting of some special, higher standard.

In the seminal *Adler v. American Standard Corp.*²⁰³ 1981 opinion, Chief Judge Murphy and the court were equally undeferential. Rather than the restricting standard of *Harrison*, the court set forth a modest standard for overturning the common law: (1) where the rule "is no longer suitable to the circumstances of our people" or (2) where a new course is "compelled by changing circumstances."²⁰⁴ By using this approach, the court need merely discern what is the better rule for present times; if that rule varies from the existing common law, the latter may be judicially altered. Finding this simple test met, the court modified the common law and recognized an employee's tort action against his employer for wrongful discharge.²⁰⁵

199. The *Harrison* standard was quoted by the court as recently as 1999, when it declined to alter the common-law, principal-accessory relationship, *State v. Sowell*, 353 Md. 713, 723, 728 A.2d 712, 717 (1999), and in 1998, when it decided not to alter the common-law rule that one could lawfully resist an unlawful arrest. *State v. Wiegmann*, 350 Md. 585, 604, 714 A.2d 841, 850 (1998).

200. See *Harrison*, 295 Md. at 459-60, 456 A.2d at 903 (citing *Williams*, 292 Md. 201, 438 A.2d 1301; *Adler v. Am. Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Condore v. Prince George's County*, 289 Md. 516, 425 A.2d 1011 (1981); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980)).

201. 281 Md. 560, 380 A.2d 611 (1977).

202. *Id.* at 564, 572-73, 380 A.2d at 613, 617.

203. 291 Md. 31, 432 A.2d 464 (1981).

204. *Id.* at 42-43, 432 A.2d at 471.

205. *Id.* at 47, 432 A.2d at 473. Similarly, in *McGarvey v. McGarvey*, the court overruled a common-law rule requiring that witnesses to a will must not have been convicted of an infamous crime. 286 Md. 19, 28, 405 A.2d 250, 255 (1979). The court was "convinced that

Six years after *Harrison*, in *Gaver v. Harrant*,²⁰⁶ the court was called upon to recognize a cause of action allowing a minor to recover for the loss of a seriously injured parent's society and affection.²⁰⁷ Although the court's opinion by the Chief Judge reiterated the "vestige" reference,²⁰⁸ it thoroughly analyzed each argument for and against the proposed new claim, concluding that "adoption of the proposed cause of action is not compelled by changing circumstances nor by a pressing societal need."²⁰⁹ It, therefore, declined to recognize the new claim and deferred any change to the legislature.²¹⁰ Nowhere in the opinion was there a suggestion that an unusually high threshold must be met in order to overturn a common-law rule.

The often quoted *Harrison* language appears to be out of sync with cases that preceded it, as well as with those that came later. As initially stated by Judge Oppenheimer in 1966, the hurdle for judicial intervention was not so significant. In *White v. King*,²¹¹ he announced, "[t]he doctrine of *stare decisis*, important as it is, is not to be construed as preventing us from changing a rule of law if we are convinced that the rule has become unsound in the circumstances of modern life."²¹² The court followed this standard for change in 1979 in *Lewis v. State*,²¹³ where the State challenged the common-law rule that an accessory could not be tried before the conviction and sentencing of the principal.²¹⁴ After reviewing the lack of reasoning behind the rule, the court prospectively abrogated it finding that it "'has become unsound in the circumstances of modern life' . . . and therefore should be changed."²¹⁵

The same relaxed standard was again used by Judge Eldridge in *Williams v. State*²¹⁶ in 1981 regarding whether the court should alter the common-law rule that a criminal defendant's right to be present at every stage of the trial can never be waived by counsel.²¹⁷ After

the rule has become unsound in the circumstances of modern life." *Id.* at 27, 405 A.2d at 254 (quoting *White v. King*, 244 Md. 348, 354, 223 A.2d 763, 767 (1966)).

206. 316 Md. 17, 557 A.2d 210 (1989).

207. *Id.* at 18, 557 A.2d at 211.

208. *Id.* at 28, 557 A.2d at 216.

209. *Id.* at 33, 557 A.2d at 218.

210. *Id.*

211. 244 Md. 348, 223 A.2d 763 (1966).

212. *Id.* at 354, 223 A.2d at 767.

213. 285 Md. 705, 404 A.2d 1073 (1979).

214. *Id.* at 708-09, 404 A.2d at 1075.

215. *Id.* at 715, 404 A.2d at 1079 (quoting *Pope v. State*, 284 Md. 309, 342, 396 A.2d 1054, 1073 (1979)).

216. 292 Md. 201, 438 A.2d 1301 (1981).

217. *Id.* at 203, 438 A.2d at 1302.

reviewing the issue on the merits, the court concluded that the rule “should now be modified in light of present conditions.”²¹⁸ In 1985, two years after the *Harrison* decision, the court in *Jones v. State*,²¹⁹ again through Judge Eldridge, abrogated the common-law rule that an accessory cannot be convicted of a greater crime than the principal.²²⁰ This rule too had “become unsound in the circumstances of modern life.”²²¹

Regardless of this precedent that articulates standards for judicial change, on frequent occasions the court has ignored the many maxims counseling judicial restraint and, instead, has reevaluated old common-law rules on their merits. Without reference to the need for any legislative deference, it has either accepted or rejected the old rule and declared the common-law rule for the present.

The court’s 1994 refusal in *Warren v. Warren*²²² to abrogate parent-child immunity in motor torts came close to fitting this pattern.²²³ Although he made some reference to the public policy that was claimed to be discernable from somewhat related legislation, Judge Karwacki primarily addressed the merits of the issue in deciding the case. Although only seven other states followed the common-law immunity rule and forty-three had abrogated it,²²⁴ Judge Karwacki concluded:

Abrogating the immunity would result only in further discord within the family and would interfere with the exercise of parental discretion in raising and disciplining children. We are not willing to open the door to rebellious children and frustrated parents and allow the courts to become the arbitrator of parent-child disputes and the overseer of parental decisions.²²⁵

The court was thereby surely resolving *de novo* a significant issue of public policy.²²⁶ It, furthermore, was doing so without reference to a restrictive standard of judicial deference, either for *stare decisis* or legislative resolution.

218. *Id.* at 217, 438 A.2d at 1309.

219. 302 Md. 153, 486 A.2d 184 (1985).

220. *Id.* at 160, 486 A.2d at 188.

221. *Id.* at 161, 486 A.2d at 188 (quoting *Lewis v. State*, 285 Md. 705, 715, 404 A.2d 1073, 1079 (1979)).

222. 336 Md. 618, 650 A.2d 252 (1994).

223. *Id.* at 619, 650 A.2d at 252.

224. *Id.* at 627-28 n.2, 650 A.2d at 256 n.2.

225. *Id.* at 626, 650 A.2d at 256.

226. *See id.* (noting that “we believe that it is still in the best interest of both children and parents to retain parent-child immunity”).

Further indicative of its frequent activist approach, the court has often reached out and changed the common law when the status of the appeal required no judicial announcement, or, even on occasion, presented no justiciable issue. In both *Adler* [wrongful discharge] and *Harris v. Jones* [intentional infliction of emotional distress] the court held that a new cause of action would be recognized, but that each plaintiff's specific allegations did not rise to the level of the newly established tort.²²⁷ Thus, the court could have readily avoided issuing dicta and ruled in each case that regardless of whether a new tort should be recognized, this was not the occasion to do so.²²⁸

The court in *Moxley v. Acker*²²⁹ did not defer to the legislature and decided an "important issue of public interest"—whether force is a necessary element of an action for forceable detainer²³⁰—without any brief or appearance for the appellee, who would have opposed such a change in the common law.²³¹ No effort was apparently taken to appoint counsel for this position or to invite an amicus to present a more independent view. The court overturned an old common-law rule despite the absence of the adversarial process.²³² Likewise, in *Jones v. State*, the court abrogated the common-law rule that kept an accessory from being convicted of a greater crime than the principal.²³³ It did so despite the criminal defendant's death pending appeal, thus clearly mooted the issue as to him.²³⁴

227. 291 Md. 31, 44, 432 A.2d 464, 471 (1981); 281 Md. 560, 572, 380 A.2d 611, 617 (1977).

228. Similarly, in *Warren*, the court addressed the issue of whether parental immunity should be abrogated. 336 Md. at 618, 650 A.2d at 252. In this case of first impression, the court declined to extend the immunity despite the fact that the plaintiffs in the case were stepparents. *Id.* In other cases, the court has taken this cautious approach. *See, e.g., Cooper v. Hartman*, 311 Md. 259, 261, 533 A.2d 1294, 1294-95 (1988) (explaining that even if the loss-of-chance doctrine were recognized, the facts of case did not warrant its application).

229. 294 Md. 47, 447 A.2d 857 (1982).

230. *Id.* at 48, 447 A.2d at 857. This display of "judicial activism" was quite at odds with Judge Couch's plea for judicial restraint in his dissent in *Boblitz*. 296 Md. 242, 283, 462 A.2d 506, 525 (Couch, J., dissenting) (noting that "over a half century this Court has periodically concerned itself with the concept of interspousal immunity and has consistently refused, by judicial fiat, to abrogate the rule, leaving it to the legislature to deal with it according to its perception of public policy").

231. *Moxley*, 294 Md. at 48, 447 A.2d at 857.

232. *Id.* at 52-53, 447 A.2d at 860.

233. 302 Md. 153, 161, 486 A.2d 184, 189 (1985).

234. *Id.* at 155, 486 A.2d at 185. The court noted that it decided moot questions "on rare occasions . . . where there is an urgency to establish a rule of future conduct on a matter of important public concern." *Id.* at 158, 486 A.2d at 187. But the court's passive ruling in *Sowell* on a closely related issue would seem to belie any "urgency."

As with the issues we have earlier encountered, the court has again declined to follow a clear jurisprudential path.

II. THEMES DRAWN FROM THE COURT'S OPINIONS

What then are the general themes that a study of this half-century worth of Court of Appeals opinions reveals? First, the court has consistently recognized—at least in theory, if not always in practice—that the General Assembly is superior to it in the making of common law. Within constitutional limits, the legislature always has the last say. Second, absent legislative intervention, the court, as the initial arbiter of the common law, has the power to alter it. Third, when the court decides to adjust a common-law rule, it retains the right to limit the alteration to prospective application, as defined in a way that will be equitable to those who had previously relied upon the validity of the old rule. Finally—and here is where the biggest difficulty arises—significant inconsistencies mark the court's *stare decisis* as to when to alter the older common-law rule. These inconsistencies arise regarding the court's view of when the legislative body is better able to select a common-law rule, when the legislature has signaled that it intends to maintain control of the decision making in a specific area of the law, and what weight, if any, the court will attribute to the presumption of the correctness of the old rule.

The most pronounced conclusion to be drawn from studying the court's behavior in deciding the thirty-three cases is that this border state has maintained its reputation for moderation, as the state with "A Middle Temperament."²³⁵ This fifty years of case law defines a pragmatic court that is neither activist nor overly deferential to the legislature. In seventeen cases it changed the common law;²³⁶ in sixteen it declined to do so.²³⁷ In nine of the nineteen tort cases it acted

235. This is the subtitle of a history of the state. ROBERT BRUGGER, *MARYLAND, A MIDDLE TEMPERAMENT, 1634-1980* (1988).

236. See *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735 (1990); *Jones*, 302 Md. 153, 486 A.2d 184; *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 497 A.2d 1143 (1985); *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983); *Moxley*, 294 Md. 47, 447 A.2d 857; *Adler v. Am. Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Williams v. State*, 292 Md. 201, 438 A.2d 1301 (1981); *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980); *Lewis v. State*, 285 Md. 705, 404 A.2d 1073 (1979); *McGarvey v. McGarvey*, 286 Md. 19, 405 A.2d 250 (1979); *Pope v. State*, 284 Md. 309, 396 A.2d 1054 (1979); *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978); *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977); *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); *Grohman v. State*, 258 Md. 552, 267 A.2d 193 (1970); *Deems v. W. Md. R.R. Co.*, 247 Md. 95, 231 A.2d 514 (1967); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951).

237. See *State v. Sowell*, 353 Md. 173, 728 A.2d 712 (1999); *State v. Wiegmann*, 350 Md. 570, 714 A.2d 841 (1998); *Warren v. Warren*, 336 Md. 618, 650 A.2d 252 (1994); *Fennell v.*

for change;²³⁸ it did likewise in five of the nine criminal cases.²³⁹ No clear political agenda seems to have been served over this period. In seven of the nineteen tort cases the court favored plaintiffs;²⁴⁰ five of the nine criminal cases were resolved to the benefit of the defendant.²⁴¹ Chief Judge Murphy wrote the majority opinion on more cases than any other judge.²⁴² He opted for change in half of these six opinions.²⁴³ Judge Eldridge, however, who authored five of the thirty-three majority opinions chose to change the common law on four of these cases.²⁴⁴

Less moderation is shown, however, when the thirty-three cases are viewed for separate periods. During the first half of this half century (1950-1975) the court entertained only seven cases. It voted to change the common law in three of these.²⁴⁵

This quieter period in American history was followed with one of widespread activism, especially within the judiciary. The Warren Court initiated change of momentous proportions in our constitu-

S. Md. Hosp. Ctr., 320 Md. 776, 580 A.2d 206 (1990); *Gaver v. Harrant*, 316 Md. 17, 557 A.2d 210 (1989); *Frye v. Frye*, 305 Md. 542, 505 A.2d 826 (1986); *State v. Minster*, 302 Md. 240, 486 A.2d 1197 (1985); *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 456 A.2d 894 (1983); *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983); *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981); *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 428 A.2d 459 (1981); *Austin v. Mayor of Baltimore*, 286 Md. 51, 405 A.2d 255 (1979); *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 238 A.2d 863 (1968); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); *Cole v. State*, 212 Md. 55, 128 A.2d 437 (1957); *Coastal Tank Lines, Inc. v. Canoles*, 207 Md. 37, 113 A.2d 82 (1955).

238. See *Julian*, 230 Md. 1, 575 A.2d 735; *Kelley*, 304 Md. 124, 497 A.2d 1143; *Boblitz*, 296 Md. 242, 284 A.2d 506; *Adler*, 291 Md. 31, 432 A.2d 464; *Lusby*, 283 Md. 334, 390 A.2d 77; *Harris*, 281 Md. 560, 380 A.2d 611; *Phipps*, 278 Md. 337, 363 A.2d 955; *Deems*, 247 Md. 95, 231 A.2d 514; *Damasiewicz*, 197 Md. 417, 79 A.2d 550.

239. See *Jones*, 302 Md. 153, 486 A.2d 184; *Williams*, 292 Md. 201, 438 A.2d 1301; *Lewis*, 285 Md. 705, 404 A.2d 210; *Pope*, 284 Md. 309, 396 A.2d 1054; *Grohman*, 258 Md. 552, 267 A.2d 193.

240. See *Kelley*, 304 Md. 124, 497 A.2d 1143; *Boblitz*, 296 Md. 242, 284 A.2d 506; *Adler*, 291 Md. 31, 432 A.2d 464; *Harris*, 281 Md. 560, 380 A.2d 611; *Phipps*, 278 Md. 337, 363 A.2d 955; *Deems*, 247 Md. 95, 231 A.2d 514; *Damasiewicz*, 197 Md. 417, 79 A.2d 550.

241. See *Groham*, 258 Md. 552, 267 A.2d 193; *Minster*, 302 Md. 240, 486 A.2d 1197; *Pope*, 284 Md. 309, 396 A.2d 1054; *Wiegmann*, 350 Md. 585, 714 A.2d 841; *Sowell*, 353 Md. 713, 728 A.2d 712.

242. See *Gaver*, 316 Md. 17, 557 A.2d 210; *Harrison*, 295 Md. 442, 456 A.2d 894; *Adler*, 291 Md. 31, 432 A.2d 464; *Felder*, 292 Md. 174, 438 A.2d 494; *McGarvey*, 286 Md. 19, 405 A.2d 250; *Harris*, 281 Md. 560, 380 A.2d 611.

243. See *Adler*, 291 Md. 31, 432 A.2d 464; *Harris*, 281 Md. 560, 380 A.2d 611; *McGarvey*, 286 Md. 19, 405 A.2d 250.

244. See *Kelley*, 304 Md. 124, 497 A.2d 1143; *Jones*, 302 Md. 153, 486 A.2d 184; *Hauch*, 295 Md. 120, 453 A.2d 1207; *Williams*, 292 Md. 201, 438 A.2d 1301; *Lewis*, 285 Md. 705, 404 A.2d 1073.

245. See *Grohman*, 258 Md. 552, 267 A.2d 193; *Deems*, 247 Md. 95, 231 A.2d 514; *Damasiewicz*, 197 Md. 417, 79 A.2d 550.

tional law.²⁴⁶ State courts as well began to reexamine the effects that the failure to consider poverty, gender, race, and other factors had had on the law.²⁴⁷ The Court of Appeals was not immune from this national trend. For the eleven-year period from 1976 to 1986 it heard and resolved twenty (sixty percent) of these thirty-three cases, a rate of about two decisions per year. Not only did it take on far more challenges than before, but it did so with an infusion of change. In thirteen (sixty-five percent) of these twenty cases, the court voted to alter the old common-law rule, thereby modernizing the state of Maryland's judge-made law.²⁴⁸ The court more often went forward on its own, exhibiting far less deference to the General Assembly. It did so, however, without any overarching public policy agenda. Plaintiffs won only half of the twelve tort cases resolved.²⁴⁹ Criminal defendants won just two of five.²⁵⁰

A reactive period then followed. For the final thirteen years of the century, the court only responded to common-law challenges on six major occasions.²⁵¹ This was a pace four times slower than during the 1976-1986 period.²⁵² Not only did the court take on fewer challenges, but when it did entertain them, it tended to vote for the status quo. Only one of the six resulted in overruling the challenged common-law rule.²⁵³ Thus, a period of little deference was followed by one of great respect for legislative prerogative.

Although different times quickened or slowed the pace of judicial resolution of common-law challenges, this statistical analysis indicates that throughout these fifty years the court remained moderate in both

246. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

247. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (finding that the Texas school financing system was unconstitutional because it did not require that state funds available for education be distributed evenly among wealthy and impoverished school districts).

248. See *infra* app. A.

249. See *id.*

250. See *id.*

251. See *id.*

252. One could argue that the pipeline of common-law challenges had been cleaned out by the activist period, leaving far fewer issues in need of attention during this subsequent period.

253. One could also argue that most of the "easy cases" had been resolved during the activist period, leaving fewer opportunities to effect change during this final period. *But compare* *Jones v. State*, 302 Md. 153, 161, 486 A.2d 184, 189 (1985) (modification of archaic principle-accessory rule), *with* *State v. Sowell*, 353 Md. 713, 734, 728 A.2d 712, 723 (1999) (refusal to modify another aspect of same rule).

its degree of self assertiveness and in its pursuit of a "liberal" or "conservative" path. It found itself favoring neither of these alternate routes.²⁵⁴

An examination of the situation in which those who dissented in these thirty-three cases found themselves provides further indication of the Court of Appeals' centrality. The most vocal dissenters, be they activists for change or passivists for the status quo, were outvoted by the moderate majority.²⁵⁵ Among the dissenting activists was Judge Rita Davidson. Voting to abolish the "harsh and arbitrary" rule of contributory negligence, she declined to "abdicate what [she] view[ed] as judicial responsibility to accommodate the law to the changing needs of society."²⁵⁶ Both Judge Davidson and her Montgomery County colleague, Judge Irving Levine, were dissenters in the cause to abolish the distinctions in negligence duties that relied upon the plaintiff's status in property law (trespasser-licensee-invitee).²⁵⁷

Judge Harry Cole was a dissenter who sought to modify the doctrine of municipal tort immunity. He unsuccessfully urged the court to "meet its responsibility head on . . . [and] bring ourselves in step with the majority of our sister states."²⁵⁸ Another activist of the same school was Judge William Adkins, who dissented from the court's refusal to recognize a cause of action against a defendant who negligently reduced the plaintiff's life expectancy from forty percent to zero.²⁵⁹ Criticizing the majority's concern that the loss-of-chance rule lacked mathematical precision, Judge Adkins declared: "Tort law is not about mathematical niceties; it has to do with fairness to fault-free

254. This analysis, of course, only produces statistical even-handedness. Whether overturning the common law only half the time or siding with plaintiffs only half the time indeed establishes "moderation" turns entirely upon one's subjective views of the court's political functioning.

255. See, e.g., *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 471, 456 A.2d 894, 909 (1983) (Davidson, J., dissenting) (noting that it is the responsibility of the Court of Appeals to "accommodate the law to the changing needs of society").

256. *Id.* at 465, 456 A.2d at 906.

257. *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 196, 428 A.2d 459, 465 (1981) (Davidson, J., dissenting); *Sherman v. Suburban Trust Co.*, 282 Md. 238, 250, 384 A.2d 76, 83 (1978) (Levine, J., dissenting). Judge Levine also disagreed with the majority's refusal to change the criminal law distinction between accessory before the fact and principal in *State v. Williamson*, 282 Md. 100, 111, 382 A.2d 588, 595 (1978) (Levine J., concurring).

258. *Austin v. Mayor of Baltimore*, 286 Md. 51, 78-79, 405 A.2d 255, 270 (1979) (Cole, J., dissenting). Judge Cole wrote that the majority's "rigid view of the rule of stare decisis simply cannot be reconciled with what I glean to be a primary concern of the judiciary: to protect the individual against unjust governmental activity." *Id.* at 80, 405 A.2d at 271.

259. *Fennell v. S. Md. Hosp. Ctr., Inc.* 320 Md. 776, 796, 580 A.2d 206, 216 (1990) (Adkins, J., dissenting).

victims who have suffered harm by reason of the tortious acts or omissions of others.”²⁶⁰

On the other hand, similarly outvoted by the moderate center were those strongly opposed to judicially enacted change. Judge Charles Markell forcefully dissented from the court’s recognition of a tort for prenatal injury.²⁶¹ His opinion chided the majority for engaging in overly intellectual, “abstract reasoning.”²⁶² Instead, he invoked Justice Holmes’ famous remark: “The life of the law has not been logic; it has been experience.”²⁶³ He trusted the legislature more than the court to act on this practical level. Similarly, Judge James Couch was a vocal dissenter from the deferential side.²⁶⁴

In most, but not all of these cases, the court was aware that it was being asked to take a major step.²⁶⁵ Generally, but not always, before addressing the merits, it discussed the propriety of change coming from the courts rather than the legislature.²⁶⁶ As is shown above, however, the confusion comes from the seemingly random way in which the court has defined the proper appellate process when a party seeks a profound change in the common law.

III. A MODEL FOR CONSISTENT GUIDELINES

Thus far, the court’s rulings on when to change outmoded common law have been excessively inconsistent and at times ambiguous. What follows is an attempt to propose more reasoned guidelines with which to resolve these issues. First, this Article discusses when the Court of Appeals should defer to the legislature due to its superior decision-making abilities. Next, this Article analyzes the times when the court should defer because of the legislature’s indicated intent to preempt an area. Finally, assuming the court has the ability and

260. *Id.*

261. *Damasiewicz v. Gorsuch*, 197 Md. 417, 443, 79 A.2d 550, 561 (1951) (Markell, J., dissenting).

262. *Id.* at 445, 79 A.2d at 562.

263. *Id.* at 443, 79 A.2d at 561 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881)).

264. *See, e.g., Boblitz v. Boblitz*, 296 Md. 242, 287, 462 A.2d 506, 527 (1983) (Couch, J., dissenting) (arguing that the court should not abrogate the immunity rule because the legislature had failed to do so after considering it seven times).

265. *See, e.g., Lewis v. State*, 285 Md. 705, 715-16, 404 A.2d 1073, 1079 (1979) (recognizing that its decision to change the common law was not in keeping with an ancient English statute).

266. *See, e.g., Moxley v. Acker*, 294 Md. 47, 51, 447 A.2d 857, 859 (1982) (noting that Article 5 of the Declaration of Rights empowers the judiciary to determine “what part of the body of English court decisions and statutes are applicable to our situation today”).

power to invoke a common-law change, this Article considers what burden a party must meet in order to convince the court to change?

A. *Which Body Is More Competent to Change the Common Law?*

As we have seen, the Court of Appeals has pointed to several differences between judicial and legislative functioning as grounds for deferring to the legislature. Numerous opinions have counseled abstention for fear that a court would otherwise declare "public policy" or fail to promote "consistency and stability." Other, generally older, opinions raised the judicial inability to issue prospective relief as a reason to opt for a legislative change. Finally, some opinions analyzed the functioning of each body and concluded that the legislature was more adept at deciding whether to make the requested change. The Court of Appeals appears not to have explicitly raised an additional reason for judicial inaction: in a democracy the legislature is the preferred branch to enact law.

1. *The Public Policy and Stability Arguments.*—From what has already been said, there can be little doubt that a court should not shy away from changing the common law merely because it involves declaring "public policy" or in order to promote "consistency and stability." Repeated declarations of public policy by the Court of Appeals establish the inevitability of the judiciary undertaking such a task. Furthermore, judge-made law can be just as consistent and smoothly implemented as can statutory law.

2. *Prospectivity and Retroactivity.*—The Court of Appeals has now firmly recognized its ability to limit common-law change to prospective application only. It last did so in *Julian v. Christopher* in 1990.²⁶⁷ The practical flexibility of this development should be preserved. Ironically, federal courts are now beginning to reject prospectivity.

Urged on by Justices Scalia and Souter, a fractured Supreme Court has recently been undoing the federal retroactivity/prospectivity rules that the Court had formulated in the 1960s.²⁶⁸ In 1965, *Linkletter v. Walker*²⁶⁹ declared that newly announced criminal law rulings by the Court need not be applied retroactively.²⁷⁰ The *Linkletter* Court

267. 320 Md. 1, 13, 575 A.2d 735, 741 (1990). *Julian* also permitted the winning party to benefit from the altered rule. *Id.*

268. See *James B. Beam Co. v. Georgia*, 501 U.S. 529, 538, 544 (1991) (plurality) (rejecting the concept of selective prospectivity in the civil context); see also *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring).

269. 381 U.S. 618 (1965).

270. *Id.* at 629.

was concerned with the litigation floodgates that might be opened if each criminal defendant who was denied a newly found constitutional benefit—such as a *Miranda* warning—should decide to attack his prosecution or conviction.²⁷¹ However, in 1987 by a 6-to-3 vote, the Court altered *Linkletter*, holding that new federal rulings must be applied to all criminal cases pending on direct review.²⁷²

On the civil side, in 1971 the Court issued *Chevron Oil Co. v. Huson*,²⁷³ which established the appropriate civil standard for nonretroactive application of a new federal rule:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that “we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” Finally, we have weighed the inequity imposed by retroactive application²⁷⁴

In 1993 the Court drastically cut back a court’s discretion to vary a federal civil ruling from anything but a retroactive application. In *Harper v. Virginia Department of Taxation*²⁷⁵ a majority held that when the “Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review . . . , regardless of whether such events predate or postdate” the new rule’s announcement.²⁷⁶ Technically, *Harper* left open the question of whether a federal ruling not applied to the parties to the appeal may be made fully prospective.

Justice Scalia has been the most outspoken opponent of prospective application. His *Harper* concurrence complained, “Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism

271. *Id.* at 637-38; see also *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966) (limiting *Miranda v. Arizona*, 384 U.S. 436 (1966) to cases in which the trial began after the date of the *Miranda* decision).

272. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

273. 404 U.S. 97 (1971).

274. *Id.* at 106-07 (quoting *Linkletter*, 381 U.S. at 629) (citations omitted).

275. 509 U.S. 86 (1993).

276. *Id.* at 97. Justice Thomas delivered the Court’s opinion and was joined by Justices Blackmun, Stevens, Scalia, and Souter. *Id.* at 88. Justices White and Kennedy concurred in judgment but did not join the section in which the quoted statement appears. *Id.*

and promoted as a 'techniqu[e] of judicial lawmaking' in general, and more specifically as a means of making it easier to overrule prior precedent."²⁷⁷ He, ironically, made this statement in support of his vote to overrule the twenty-two-year-old precedent of *Chevron Oil*.

Justice Scalia has argued that Article III courts have but limited power "to say what the law is,"²⁷⁸ "not the power to change it"²⁷⁹ or to say "what the law *shall be*."²⁸⁰ He has echoed the prevalent early twentieth century viewpoint:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*.²⁸¹

The Court's rulings rejecting prospectivity apply only to the application of federal law. It is still agreed that the states have the power in their spheres independently to make the "choice . . . between the principle of forward operation and that of relation backward."²⁸² The Court's recent rulings leave unchanged this consequence of federalism.²⁸³

277. *Harper*, 509 U.S. at 105 (Scalia, J., concurring) (quoting Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960)). Repeating himself somewhat, Justice Scalia also colorfully stated, "Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disregard for *stare decisis*." *Id.* at 107-08.

278. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

279. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

280. *Harper*, 509 U.S. at 107 (Scalia, J., concurring). Justice Souter's opinion for the Court in *James Beam* also resurrected this ancient notion. Full retroactivity "also reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it." *James Beam*, 501 U.S. at 535-36 (citations omitted).

281. *James Beam*, 501 U.S. at 549 (Scalia, J., concurring). Justice White responded:

Even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.

Id. at 546 (White, J., concurring).

Others agree with Justice White. Justice Barak wrote, "[J]udges should be honest. If they create new law, they should say so. They should not hide behind the rhetoric that judges declare what the law is but do not make it." Barak, *supra* note 42, at 62.

282. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932).

283. Justice Souter's opinion for the Court in *James Beam* acknowledged that *Sunburst's* rule remains for the states. Because a federal ruling was at issue in *James Beam*, the choice there was to be resolved by federal law. *James Beam*, 501 U.S. at 535.

There are numerous reasons why what is best for a federal court rule may not be necessary or suited to a state court. Insofar as the Supreme Court decisions find their bases in the special constitutional limits upon an Article III court, the federal response is not necessarily applicable to a state's highest court. In Maryland, for example, the Court of Appeals is not constitutionally confined to "cases" or "controversies."²⁸⁴ Instead, even absent a case or controversy, it may exercise its discretion to resolve "matters of important public concern."²⁸⁵ Thus, the Court of Appeals has more leeway to issue a purely prospective new ruling, i.e., one not granting relief to the party who sought the new rule. It has the power to go beyond the narrow "controversy" posed by the parties to the case.

Equally distinguishable from the federal precedent is the subject matter with which the Court of Appeals deals. At issue here is the court's willingness to overturn a creature of its own design—the common law. The federal cases generally have concerned constitutional rulings that have a far more basic quality.²⁸⁶ Also, such federal cases often involve parties with ongoing relationships, such as a government and its taxpayer. This ongoing relationship might better justify greater retroactivity than would the typical first-time encounter of the parties in a Maryland tort or criminal law setting. Finally, federal constitutional rulemaking requires far greater checks and balances than does the situation in which the Court of Appeals is asked to overturn a common-law rule. The General Assembly can redesign any common-law change that the Court of Appeals chooses to make. Thus, the check on the court is well in place.

As noted above, the behavior of the Court of Appeals over the past fifty years further demonstrates that the exclusion of the need to make its rulings retroactive would not turn it into an overly activist court. Contrary to Justice Scalia's concerns, the Court of Appeals' ability to limit the retroactivity of its new rulings where equity so demands has not bred judicial activism.

3. *Relative Competency.*—The ongoing controversy as to which body should be entrusted to alter the existing common law focuses in part upon the relative abilities of each entity to undertake this task.

284. See *Reyes v. Prince George's County*, 281 Md. 279, 290, 380 A.2d 12, 18 (1977).

285. *Lloyd v. Bd. of Supervisors*, 206 Md. 36, 43, 111 A.2d 379, 382 (1954).

286. The Court of Appeals has emphasized the distinction between new interpretations of constitutional provisions and changes in common law. See *Am. Trucking Ass'n v. Goldstein*, 312 Md. 583, 592 n.7, 541 A.2d 955, 959 n.7 (1988) (noting that changes in the common law apply in a prospective manner only, except for the parties).

This debate generally focuses on three aspects of their relevant decision-making: (i) the differences in the processes in which each engages, (ii) the differing abilities to fashion remedies, and (iii) the proper role of each in a democratic society. Although sound arguments can be made for either side, with the judiciary's adaptation in the past fifty years to more involved decision-making processes and remedies, by and large its decisional processes no longer suffer at a disadvantage to those of the legislative branch.

a. The Differences in the Decision-Making Processes.—There are a number of classical differences between the ways in which the legislative and judicial bodies operate.²⁸⁷ Many of these can be seen as limiting a court's ability to enact legal rules. Most distinctively, courts function in a more passive role in which they generally must wait to act until parties bring them an issue.²⁸⁸ Legislative bodies, on the other hand, can independently initiate rule change.²⁸⁹ Furthermore, the problems brought to a court are usually presented in a bipolar, two-party context, without input from other more remotely affected parties, who often gather to participate in the legislative process.²⁹⁰ Our adversarial system and notions of justiciability generally limit the court to the legal controversy presented by specific facts, unlike the open-ended manner by which a legislature can address an issue. Courts also have traditionally confined their inquiry to the historical facts relating to the parties, which are further limited by stringent rules of evidence. Also, parties to a suit generally have inferior resources for fact gathering.²⁹¹

287. See MICHAEL SINCLAIR, *GUIDE TO STATUTORY INTERPRETATION* 15-17 (1st ed. 2000) (listing many of the differences in the operation of judges and lawmakers).

288. Tocqueville upon his journey through America realized in the 1830s that an American judge can "act only when called upon." He further observed: "There is nothing naturally active about judicial power; to act, it must be set in motion. When a crime is denounced to it, it punishes the guilty party; when it is called on to redress an injustice, it redresses it; when an act requires interpretation, it interprets it; but it does not on its own prosecute criminals, seek out injustices, or investigate facts." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 100 (New York: Harper & Row, 1988, Lawrence trans., Mayer ed.). To Judge Henry Friendly, legislatures have the "ability to act without awaiting the adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court." Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963).

289. MD. CODE ANN., STATE GOV'T §§ 2-1501 to -1516 (1999) (providing statutory procedures for preparation, introduction, and consideration of proposed changes); *id.* §§ 2-1601 to -1609 (creating investigation procedures).

290. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

291. Friendly, *supra* note 288, at 791-92.

Over the past several decades, many, if not most, of these distinctions have been fading. Insofar as process is concerned, courts are increasingly taking on multi-party conflicts with wide-ranging social consequences as they oversee the management of school systems, massive class actions, and the corporate status of modern giant corporations. In 2000, while one federal court was deliberating upon the proper corporate structure of Microsoft, the Vermont Supreme Court opened the door to same-sex unions.²⁹² Liberal joinder rules permit many to gain party, or at least amicus status.²⁹³ Courts frequently appoint masters to act as managers of dispute resolution.

Not feeling themselves limited to the record presented by the parties, appellate courts routinely resort to "legislative facts," which involve studies and opinions produced outside the judicial system.²⁹⁴ Furthermore, as has been noted, the Court of Appeals is not limited by resolving a "case" or "controversy" as are Article III federal courts.²⁹⁵ It, therefore, has the power to undertake and resolve an appeal that has become moot, but which raises "matters of public importance," a power akin to the ability to render "advisory opinions."²⁹⁶

Aiding the work product of the appellate judicial system is its composition of full-time, fully-paid professional experts, who, unlike the legislators (in Maryland), can focus on their work for more than the limited ninety-day time frame that the legislative session generally permits.²⁹⁷ Furthermore, while "[t]he recent exponential growth in legislation that the General Assembly produces has worsened the tyranny of the calendar,"²⁹⁸ the Court of Appeals, which has no deadline for resolving a case, wields a certiorari power that permits it to reflect in greater leisure.²⁹⁹

Professors Kenneth Abraham and William Reynolds have specifically focused upon whether a court should defer to the legislature

292. See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

293. *E.g.*, Md. R. Civ. P. 2-211 to 2-214, 2-221, 2-231, 2-332, 2-332 & 8-511.

294. See, *e.g.*, *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 782 A.2d 807 (2001) (relying on multiple research studies in its analysis of minor participants in a study on the effects of lead paint); *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 497 A.2d 1143 (1985) (referencing in its overall analysis several studies conducted on handguns).

295. Neither the Maryland Constitution nor Declaration of Rights contains such a requirement. See *Reyes v. Prince George's County*, 281 Md. 279, 290, 380 A.2d 12, 18 (1977).

296. *Lloyd v. Bd. of Supervisors*, 206 Md. 36, 43, 111 A.2d 379, 382 (1954).

297. Barring extraordinary circumstances, MD. CONST. art. III, §§ 14 & 15(a) so limits the General Assembly.

298. Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432, 439 (1995).

299. In exercising its certiorari power, the court can tailor its docket to whatever size suits it.

when asked to abandon the common-law negligence rule for one of comparative negligence. In Professor Abraham's view:

The argument that adopting a comparative negligence rule is beyond the province of the courts has always had a hollow ring to it. Contributory negligence, after all, is a court-created doctrine; the courts would seem not to be automatically precluded from modifying what they have created. And the reasons often given for abolishing contributory negligence—its unfairness in penalizing plaintiffs for very small amounts of carelessness and the case-to-case inconsistencies that result from relying on a rule that conflicts with the jury's intuitive notions of fairness—are characteristically the kinds of arguments that courts consider in fashioning legal doctrine.³⁰⁰

Professor Reynolds agrees, "As for competence, the doctrine of comparative negligence involves issues with which courts are intimately familiar and it is hard to imagine why the necessary elaboration could not be accomplished in the form of a judicial opinion."³⁰¹ Although the adoption of comparative negligence has been undertaken by more legislatures than courts,³⁰² Professor Reynolds points to a respected survey that "found that legislative law in this area was not any better than could be expected of judicial law."³⁰³

In their influential 1890 article, *The Right to Privacy*, Louis Brandeis and Samuel Warren described the common law as a dynamic process: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."³⁰⁴ The authors went on to argue for the judicial creation of the new tort of their title. Over the past century, with the invaluable support coming from the writings of Dean William Prosser,³⁰⁵ the judiciaries of most states, including Maryland, have recognized a cluster of torts that fall within this general title.³⁰⁶ The Court of Appeals created these new torts with little concern for deference to the legislature; in 1962, in an exercise of its power to define

300. Kenneth S. Abraham, *Adopting Comparative Negligence: Some Thoughts for the Late Reformer*, 41 MD. L. REV. 300, 304 (1982).

301. WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 159 (1980).

302. For a recent numerical breakdown, see VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 513-18 (4th ed. 2002).

303. REYNOLDS, *supra* note 301, at 159 (citing Robert A. Leflar, *Comment on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide*, 21 VAND. L. REV. 918 (1968)).

304. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

305. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

306. *Id.* at 386-88.

the common law, the court recognized the tort of invasion of privacy.³⁰⁷

The abolition of parent-child immunity and of the matrix that defines the rights of property owners to tort victims on their land, which the court has frequently declined to do, is also surely within the judiciary's competence. If the court was competent to largely abolish spousal immunity, the similar problem posed by the immunity between parent and child should be of no greater difficulty. Similarly, if the court can construct the complex matrix of four differing levels of tort duty defined by the status of the tort victim on the premises (and a distinction between real and personal property in the equation), it can surely uncomplicate matters and opt for a standard of reasonableness for whatever setting.³⁰⁸ This is particularly true when Maryland is left awkwardly standing behind while the courts and legislatures of most other states have modernized their rules.³⁰⁹

b. The Differences in Available Remedies.—The second group of major distinctions between the judicial and legislative processes looks to the breadth and quality of the remedies that each can provide. In a more practical sense, courts historically have been unwilling or unable to undertake community problems that require complex rulemaking, managerial oversight, tax raising, or other forms of allocating public resources. Also, courts generally are limited to rules of reasonable scope and less detailed statement. The legislature can set the speed limit at fifty-five or sixty-five miles per hour, while courts are disinclined to promulgate unilaterally such precise solutions. Courts, furthermore, do not have the luxury of delegating the details of a remedy to an administrative body for execution.

The distinctions between remedies, however, have also diminished. As discussed earlier, appellate courts now promulgate rules with prospective limitation, just as legislatures have done. Most now agree that judicial rulings are not merely the court having "found" the law, but instead, just like the legislature, having "made" it.³¹⁰ State

307. *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962).

308. *See, e.g., Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (stating that reasonable people do not vary their conduct based on level of tort duty required by a person on their premises).

309. Only four states and the District of Columbia still retain the contributory negligence standard. *See* SCHWARTZ, *supra* note 302, at 513-18. Maryland was the last state in the Union to abolish the differentiation between principle and accessory. *See* *State v. Sowell*, 353 Md. 713, 721-22, 728 A.2d 712, 716-17 (1999).

310. *See* Michael D. Green, *The Road Less Well Traveled (and Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377, 379 (1999) (regarding the judicial "making" of products liability law).

appellate courts have ruled taxing schemes for education to be unconstitutional, thus requiring corrective legislation.³¹¹

But for the most part, requests to the judiciary to alter the common law will not involve such complex, multi-issue disputes involving complicated business or social interactions. For the most part common-law decision-making merely consists of the resolution of a narrow issue between two parties. Greater nuance can be arrived at later when another case raises issues left unanswered in the initial, precedent setting case. Courts have been creating the common law for centuries. There is little reason not to expect them to be capable of continuing to do so.

The Court of Appeals was facing no more difficult a task in *State v. Minster*, when it abstained from revising the common-law murder "year and a day" rule.³¹² There would seem to be no reason for the court to be perplexed by the undertaking of choosing between the available choices: (i) keeping the rule, (ii) lengthening it, (iii) reducing it to a rebuttable presumption, or (iv) abolishing it and leaving causation to the jury. These are familiar choices well within the judicial ken.³¹³

c. *Abiding by a Democratic Process.*—A final, most fundamental distinction is that legislative bodies, being directly elected by the citizenry, are a far greater democratic representation of the people's desires than the more remote judiciary. Adherents to a democratic government should, therefore, prefer legislative to judicial problem solving. Because in Maryland the people themselves are the state's "source of power,"³¹⁴ and the people elect the legislature, it is the "predominant branch of government."³¹⁵

Nevertheless, the Constitution has placed great trust in the judiciary. As noted by the court in 1802, the power granted the courts helps guarantee their "uprightness and independency" due to their "liberal salaries" and distinction for "integrity, experience and . . . legal knowledge." Thus, it is inherently consistent with the constitutional division of powers that each determination of what the common law should be

311. See, e.g., *Serrano v. Priest*, 557 P.2d 929, 934-35 (Cal. 1976) (holding that a California public school financing system violated equal protection of the state constitution by conditioning availability of school revenue upon district wealth thereby requiring the legislature to restructure the system).

312. See 302 Md. 240, 241, 486 A.2d 1197, 1197 (1985).

313. Other state courts had been able to accomplish the task. See *id.* at 245, 486 A.2d at 1199.

314. *Whittington v. Polk*, 1 H. & J. 236, 242 (Md. 1802).

315. *Crane v. Meginnis*, 1 G. & J. 463, 472 (Md. 1829).

"is a question that comes within the province of the Courts of justice, and is to be decided by them."³¹⁶

Some have challenged the idea that the legislative route is preferable in a democracy. In the American system it traditionally has been the judiciary that steps in to reign the "tyranny of the majority."³¹⁷ Ronald Dworkin argues that sensitive issues of society's moral evolution are more effectively resolved in courts than in legislatures. He reasons that public fora are dominated by electioneering slogans, pressure groups, and political alliances; politics reaches resolutions based more on compromise than reasoned moral debate.³¹⁸

Furthermore, critics have noted, particularly in recent times, the politically motivated tendency of legislatures to shy away from specificity, leaving it to the courts to fill in the more contentious issues. Thus, political hot potatoes are often passed off to the more insulated judiciary, which is left to interpret an ambiguous statute.³¹⁹ Even with far less controversial issues, the legislature's focus on more substantial items often detracts its attention.³²⁰ As Judge Thomas Hunter Lowe remarked, "I would no longer await the action of a Legislature which may well be too occupied with matters of state to clean up the jurisprudential cobwebs we have accumulated."³²¹ The need for change in a specific area may well fly beneath the General Assembly's radar screen.

Nevertheless, these contentious issues of respect for democratic integrity need not be answered in the context of judicial change of the common law. Because the legislature retains the power to overrule any judicial change, any significant judicial thwarting of the peoples'

316. *State v. Buchanan*, 5 H. & J. 317, 365-66 (Md. 1821).

317. Tocqueville long ago warned Americans of the dangers that the "Tyranny of the Majority" posed in our democratic system, where the elected majority can impose its will upon the out-voted minority. DE TOCQUEVILLE, *supra* note 299, at 250. Some have responded to this concern by emphasizing that it is the role of the courts to safeguard the underrepresented minorities. See, e.g., *United States v. Caroline Products*, 304 U.S. 144, 153 n.4 (1938).

318. Ronald Dworkin, *Mr. Liberty*, NEW YORK REVIEW OF BOOKS (Aug 11, 1994).

319. "Legislators have become astute at turning a deaf ear to highly visible issues on which they do not wish to gamble their professional lives." Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 8 (1977).

320. Robert E. Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254, 1262 (1966) (stating that "[o]nly the most compelling needs are likely to capture [a legislature's] attention"); Schaefer, *supra* note 84, at 24 ("The legislature must deal with the ever increasing details of governmental operations. It has little time and little taste for the job of keeping the common law current.").

321. *Williamson v. State*, 36 Md. App. 405, 414, 374 A.2d 909, 914 (1977) (Lowe, J., dissenting), *rev'd*, 282 Md. 100, 382 A.2d 588 (1978).

desires would be short lived. Corrective action would be but a legislative session away.

B. When Has the Legislature Actually Preempted Judicial Change of the Common Law?

Having reviewed the court's decisions regarding legislative intent to preempt an area, several reasonable rules are evident. First, legislative intent should not be drawn from legislative inaction or, generally, unsuccessful legislative efforts. Each of these forms of legislative behavior produces feeble evidence as to what the legislature as a body actually intends.

Reliance upon nonaction to indicate legislative intent has been discouraged by the court's statutory interpretation case law. In similar contexts, it has noted that inaction by a legislative body after the issuance of a judicial opinion "affords the most dubious foundation for drawing positive inferences."³²² There are many causes of inaction, including a failure to consider the specific issue, which may be lost in a sea of other pressing legislative needs.

Furthermore, granting any significance to the legislature's failure to enact a bill would seem to run counter to the court's frequent pronouncement that it is insufficiently persuasive to rely upon a bill's failed passage as an indication of legislative intent.³²³ One court has reasoned that a bill may have failed for the following reasons:

insufficient legislative time for consideration and because of bill priorities established by legislative leadership, or the efforts of special interests, or lobbying efforts at a committee or floor level, or numerous unidentifiable, extraneous factors unrelated to what the majority of the legislature thought about the merits of a bill.³²⁴

Thus, the court should glean no real evidence of intent for either legislative inaction or unsuccessful legislative action.

Under this logic, insofar as *Austin* (refusing to abolish municipal immunity) and *Harrison* (refusing to abolish contributory negligence)

322. *Harden v. Mass Transit Admin.*, 277 Md. 399, 406, 354 A.2d 817, 821 (1976) (quoting *United States v. Price*, 361 U.S. 304, 310-11 (1960)). Judge Davidson made this point in dissent in *Felder v. Butler*, regarding the legislature's failure to act in the Dram Shop area. 292 Md. 174, 185, 438 A.2d 494, 500 (1981) (Davidson, J., dissenting).

323. *McCulloch v. Glendening*, 347 Md. 272, 290 n.13, 701 A.2d 99, 107 n.13 (1997) (citing *Auto. Trade Ass'n of Md., Inc. v. Ins. Comm'r*, 292 Md. 15, 24, 437 A.2d 199, 203 (1981)).

324. *Sorensen v. Jarvis*, 350 N.W.2d 108, 112 (Wis. 1984). The court also noted, "a failure to pass legislation is so equivocal as to be meaningless." *Id.*

sought legislative intent from the legislature's failure either to act at all or to enact legislation, they would be wrongly decided.³²⁵ Decisions such as *Boblitz* (modifying spousal immunity), which disregarded legislative inaction, would be rightly decided insofar as judicial process is concerned.³²⁶ The legislative histories in these cases failed to provide sufficient intent of legislative preemption.

At the other extreme, when the legislature has extensively regulated a field of activity, little argument can be made that it has, by its actions, preempted that area and has precluded any role for judicial common-law change. Instead, the court's role in this situation would be limited to interpreting how the General Assembly's statutes should be applied.

On the less obvious terrain one finds cases such as *Howard* (refusal to abrogate charitable immunity), which confronted a patchwork of existing statutes that were not fully preemptive on their face.³²⁷ The issue posed is whether their partial preemption signaled an intent to exclude further judicial decision-making.

A similarly nonobvious situation is that presented by *Adler* (employee's claim for wrongful discharge), in which the courts established a common-law rule (the contract at will doctrine), but the legislature created several statutory exceptions.³²⁸ At issue would be whether, in so doing, the legislature intended the list to be inclusive, thereby barring any judicial additions to the list. A comparable instance would be presented by a party asking the court to recognize a common-law privilege regarding confidential communications between a parent and child. By statute, the General Assembly has created several evidentiary privileges.³²⁹ In doing so, did it intend to preempt the area and impliedly prohibit judicial enlargement of this list? Would the fact that courts have a closer working relationship with rules of evidence indicate that in this area the legislature would be more willing to defer?

325. *Austin v. Mayor of Baltimore*, 286 Md. 51, 70, 405 A.2d 255, 265 (1979); *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 462, 456 A.2d 894, 904 (1983).

326. *Boblitz v. Boblitz*, 296 Md. 242, 250, 462 A.2d 506, 509-10 (1983).

327. *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 236, 238 A.2d 863, 864 (1968).

328. *Adler v. Am. Standard Corp.*, 291 Md. 31, 35, 432 A.2d 464, 467 (1981).

329. See MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (2002) (stating that a "spouse of a person on trial for a crime may not be compelled to testify as an adverse witness" with some exceptions); see also MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (2002) (declaring that an individual "may not be compelled to testify in violation of attorney-client privilege"); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (2002) (creating a privilege between patient and psychiatrist or psychologist).

It is difficult to categorize all fact patterns relating to the search for legislative intent. A host of variables exist and each situation must be viewed in its particular context. Of concern here, however, are standard issues of a court's quest to determine legislative intent. In the context of whether the courts should defer to the legislature's wishes, the court must draw upon its usual rules of legislative interpretation. By doing so, it would be adhering to a somewhat predictable and consistent jurisprudence.

C. What Standards Should the Court Apply When Considering Changing the Common Law?

Ideally, there should exist in Maryland a set of rules that define the court's decision-making process when it considers whether to change what may be deemed "incorrect" common law. Such a set of rules would help bring "the rule of law" to this often politically charged area. It would force the judges to consider the neutral principles concerning the process of change and whether the means rightfully exist to get to the judge's desired result. It would help force a judge not to consider just his own political view of whether the status quo is beneficial. Instead, the role of *stare decisis* would have to be evaluated and the bounds of judicial limit explored with reason.

Professors Mishkin and Morris have suggested several sensible guidelines for the judicial overturn of precedent.³³⁰ First, they would put the burden of persuasion on the proponent of change.³³¹ Second, they would require that any court that chooses to alter the law must specifically articulate the reasons why it has chosen to do so.³³² Third, the power to overrule should be exercised with care and "only upon a strong basis in reason."³³³ Fourth, the change should "not upset justified reliance upon the old law."³³⁴ Fifth, overruling may occur because either (i) "[t]he earlier decision may simply have been wrong when decided—whether for reasons evident at the time or for others which have since become apparent" or (ii) "conditions in the society may have changed, rendering an earlier sound rule ill-adapted to the circumstances or standards" of today.³³⁵ Finally, added to these guidelines—in accord with the suggestions provided in Parts III A and

330. PAUL J. MISHKIN & CLARENCE MORRIS, *ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW* 78-85 (1965).

331. *Id.* at 80; *see also* Barak, *supra* note 42, at 31.

332. MISHKIN & MORRIS, *supra* note 330, at 85; *see also* Barak, *supra* note 42, at 31 (citing William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949)).

333. MISHKIN & MORRIS, *supra* note 330, at 80.

334. *Id.*

335. *Id.* at 79.

B—could be that the court would refrain from acting where to do so would either (i) venture into an area in which it was substantially ill equipped to act or (ii) where the legislature has clearly indicated its intent fully to preempt.

Presumptive adherence to prior rulings helps assure in a democratic society that we will live by rule of stated laws, rather than the whims of individual judges. Thus, the proponent of change must make the case for change. Those opinions of the court that appear to overrule the common law on a *de novo* standard fail sufficiently to respect *stare decisis*.³³⁶

This necessary deference is also safeguarded if the overruling court is required to think through its action and justify it with a written explanation. The rigors encountered in writing out one's reasoning often force a greater appreciation of the problem at hand by exposing flaws that abstract, hasty thinking cannot uncover.³³⁷ The reasoning should be of two parts: (i) an analysis of whether in the specific instance it is appropriate for the court to exercise its power to reappraise the challenged rule, and (ii) if so, an analysis of the merits underlying the new rule. In addition to advancing sound reasoning, articulation of the steps taken in the decision-making process will promote a rule of law to apply when deciding to abide by or overrule older common law. The bar and lower courts will thereby know what standards must be followed.³³⁸

Because the Maryland Court of Appeals has equitably exercised its power to make new decisions prospective only, there should be no serious concern with the Mishkin-Morris caveat against upsetting expectations. This major impediment to correcting "wrong" rules, therefore, generally does not exist in Maryland. Permitting overruling where the decision was "wrong" *ab initio*, and not just where the times have changed, helps the common law avoid the perpetuation of unjust errors. It is accordingly appropriate that the unusually high threshold that appears to be set forth in *Harrison* be modified.³³⁹ *Stare decisis* can be overruled for reasons broader than "changed conditions

336. See, e.g., *Jones v. State*, 302 Md. 153, 486 A.2d 184 (1985).

337. Cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (noting the value of having administrative decision makers state the reasons for their decisions).

338. Lower courts, of course, are powerless to alter the State's common law. Nevertheless, a trial court or Court of Special Appeals judge would at least have an outline to follow in dicta if he or she were of the opinion that the time for change had come and chose to offer the suggestion in the event *certiorari* was granted.

339. See *supra* notes 196-202 and accompanying text (discussing the threshold for change of common law suggested by *Harrison v. Montgomery County Board of Education*, 295 Md. 442, 459-60, 456 A.2d 894, 903 (1983)).

or increased knowledge.”³⁴⁰ Regardless of the evolution of time, fifty-year-old mistakes can be rectified.

The legislature’s ability to trump the judiciary regarding nonconstitutional issues of common law stands as a powerful safeguard against inappropriate judicial intrusion into the legislative domain. It supplies the most obvious reason to permit the court to be less concerned with abusing its power by overturning a common-law precedent. If it acts incorrectly, its generated harm is modest. It acts in a low-risk environment. Thus, there is little harm in deciding the merits of a case even if the court was handicapped in its fact-finding or other decision-making abilities. There is little downside if it ventures into an area that the legislature later explains it intended to preempt. To remedy this situation the legislature need only speak up.³⁴¹

When the court overrules a precedent in an opinion based on state constitutional law, it takes drastic action for our democratic system to rectify what the greater society sees as a mistake. Amending the Constitution is a major undertaking.³⁴² But when the court overturns common law and the people’s representatives disagree, the General Assembly can readily rectify the matter. This will especially be the case where the court’s “mistaken” overruling concerns a matter of sufficient concern to be widely noticed. And even if the court’s ruling flies beneath the legislature’s radar screen, almost by definition, the consequence will be minimal.

Legislative reversal is not an intellectual abstraction. In past years the General Assembly has been far from reluctant to exercise its power to overrule the decisions with which it disagrees. The flexing of legislative muscles was most evident in the 2000 legislative session, which reacted against three Court of Appeals opinions issued in 1999.³⁴³

340. *Harrison*, 295 Md. at 459, 456 A.2d at 903.

341. This presumes that the court’s ruling was given appropriate prospectivity so as not to cause harm during the interim between judicial opinion and legislative enactment.

342. Article XIV of the Maryland Constitution states:

The General Assembly may propose Amendments to this Constitution The bill or bills proposing amendment or amendments shall be publicized . . . preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted . . . to the qualified voters of the State for adoption or rejection. . . . [I]f it shall appear to the Governor that a majority of the votes cast at said election on said amendment . . . were cast in favor thereof, the Governor shall . . . declare the said amendment . . . to have been adopted by the people of Maryland as part of the Constitution thereof

MD. CONST. art. XIV, § 1

343. See *supra* note 16 and accompanying text (discussing legislative proposals to change three court decisions in 2000). Earlier examples of swift legislative reversal readily exist.

Accordingly, it is generally a low risk act for the court to overturn common-law precedent. If in so doing it has overstepped its judicial bounds, the General Assembly can readily intervene. Indeed, with the court's ability to rule prospectively, it can readily give the General Assembly the ability, in essence, to sit in review of its decision. Given this escape hatch, there is little practical need for the court, when in doubt, to shy away from promulgating common-law change at an area close to the line demarking the boundaries between judicial and legislative authority.

In 1994 the court interpreted the then existing paternity statute to preclude a father from using blood or genetic test results to reopen a judicial finding of paternity except under narrow, hard-to-meet grounds. *Tandra S. v. Tyrone W.*, 336 Md. 303, 315, 648 A.2d 439, 445 (1994). In the next legislative session the General Assembly promptly acted and permitted a later challenge to a paternity finding by the use of blood or genetic evidence. 1995 Md. Laws ch. 248 (codified at MD. CODE ANN., FAM. LAW § 5-1038 (1999)); *see also* *Langston v. Riffe*, 359 Md. 396, 411, 754 A.2d 389, 437 (2000) (noting that the statutory amendment allowed the court to set aside a paternity declaration and apply the remedial law retroactively).

APPENDIX **MARYLAND COURT OF APPEALS CASES CONFRONTING** **REQUEST FOR COMMON LAW CHANGE**

Early Period [1950-1975]

<i>Date</i>	<i>Name</i>	<i>Issue</i>	<i>Author</i>	<i>Change</i>	<i>Winner/loser</i>
1951	Damasiewicz	prenatal injury	Marbury	Yes	Child P over D
1955	Canoles	W's consortium	Henderson	No	Ds over wives
1957	Cole	insanity defense	Henderson	No	State over crim Ds
1966	White	tort conflicts	Oppenheimer	No	Party neutral
1967	Deems	H's consortium	Oppenheimer	Yes	wives over ins. Co./Ds
1968	Howard	abrog charit imm	Finan	No	charity over Ps
1970	Grohman	contempt aff	Finan	Yes	crim Ds over State

Activist Period [1976-1986]

<i>Date</i>	<i>Name</i>	<i>Issue</i>	<i>Author</i>	<i>Change</i>	<i>Winner/loser</i>
1976	Phipps	strict liab c/a	Eldridge	Yes	Ps over mfgs
1977	Harris	intl infl c/a	Murphy	Yes	Ps over Ds
1978	Lusby	spous imm/int tort	Smith	Yes	spouse over spouse [no ins]
1979	Pope	mispr-felony	Orth	Yes	crim Ds over State
1979	Lewis	timing access	Eldridge	Yes	State over crim Ds
1979	McGarvey	witness compt.	Murphy	Yes	testators over will challengers
1979	Austin	abrog govt imm	Orth	No	govt over Ps
1980	Kline	abro crim conversion	Davidson	Yes	Ds over Ps
1981	Murphy	duty to trespr	Digges	No	land owner over Ps
1981	Adler	wrongful dis	Murphy	Yes	ee over er
1981	Felder	no dram shop	Murphy	No	ins co over Ps
1981	Williams	waive rt present	Eldridge	Yes	State over crim Ds
1982	Moxley	forcible detainer	Couch	Yes	Prop owners over Ps
1983	Hauch	lex loci	Eldridge	No	party neutral
1983	Harrison	no comp negl	Murphy	No	ins co over Ps
1983	Boblitz	immun.	Menchine	Yes	spouse over ins co
1985	Jones	access. Punshmt	Eldridge	Yes	State over crim Ds
1985	Minster	year & day S/L	Couch	No	crim Ds over State
1985	Kelley	Sat. night guns	Eldridge	Yes	Ps over gun mfg
1986	Frye	parent-child imm	Orth	No	ins co/parents over child

"Latest, Deferential Period [1987-2000]"

<i>Date</i>	<i>Name</i>	<i>Issue</i>	<i>Author</i>	<i>Change</i>	<i>Winner/loser</i>
1989	Gaver	loss of parent c/a	Murphy	No	D over child
1990	Julian	"Silent Consent"	Chasanow	Yes	T over LL
1990	Fennell	no loss of chance	Chasanow	No	ins co over Ps
1994	Warren	parent-child immun	Karwacki	No	No ins co/parents over child
1998	Wiegmann	rt resist wr arrest	Cathell	No	Crim Ds over State
1999	Sowell	access/principal	Cathell	No	Crim Ds over State